

ORIGINAL COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 665



HARRIETT V. PENCE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 29, 1941.

CERTIORARI GRANTED NOVEMBER 10, 1941.

IN THE
United States Circuit Court of Appeals
For the Seventh Circuit

No. **7516**

HARRIETT V. PENCE,

Plaintiff-Appellee,

vs.

THE UNITED STATES OF AMERICA,

Defendant-Appellant.

Appeal from the District Court of the United States for the
Eastern District of Wisconsin.

INDEX.

Placita	1
Complaint, filed Aug. 5, 1939	1
Exhibit A—Letter July 10, 1939, Hines to Harriett V. Pence	6
Notice and motion to strike complaint, filed Sept. 22, 1939	7
Order striking portions of complaint, entered Oct. 2, 1939	8
Answer, filed Oct. 11, 1939	9
Demand for Jury Trial, filed Dec. 26, 1939	11

TRANSCRIPT OF PROCEEDINGS.

Colloquy	12, 60, 84, 112, 153, 165
----------------	---------------------------

WITNESSES FOR PLAINTIFF.

Testimony of:

Pence, Harriett V.	16
Pence, John Robert	39
Pence, Lawrence Waldo	45
Thompson, Dr. Arch B.	63
Warner, G. William	55

WITNESSES FOR DEFENDANT.

Testimony of:

Brogan, Austin J.	149
Butke, Dr. T. A.	124
Field, Albert	144
French, Dr. Royal F.	121

Glickman, Dr. L. Grant	107
Hollingsworth, Dr. Edward W.	127
Posey, Richard B.	135
Charge to Jury	158
Abridged Statement of Exhibits, filed Nov. 8, 1940...	166

PLAINTIFF'S EXHIBITS.

No. 1—Incontestability Clause 9—Policy No. K-711,035	168
No. 2—Certificate of renewal of insurance (Statement of)	169
No. 3—Application for reinstatement of insurance...	169
No. 4—(Also Deft. Ex. I)—Application for U. S. Government Life Insurance	174
No. 8—Application for physical examination report for Civil Service examination	175
No. 9—Reference to Report of Adjutant General of the Army	184
No. 10—Physical examination report, dated Oct. 10, 1928 (Portion of)	184
No. 13—Physical Examination report, dated June 3, 1929 (Portion of)	185
No. 14—Physical Examination report, dated Nov. 12, 1930 (Portion of)	187
No. 15—Physical Examination report, dated May 27, 1931 (Portion of)	189
No. 16—X-Ray or fluoroscope examination report, dated July 22, 1931 (Portion of)	190
No. 17—X-Ray or fluoroscope report, dated Aug. 2, 1934 (Portion of)	190
No. 18—Physical examination report commencing Feb. 27, 1933 (Portion of)	191
No. 19—Physical examination report, dated Dec. 9, 1931	196

DEFENDANTS' EXHIBITS.

Exhibit D—Application for compensation, etc., dated Aug. 27, 1928 (Portion of)	197
Exhibit E—Application for retirement, dated May 24, 1929 (Portion of)	199
Exhibit F—Application for disability allowance (Portion of)	201
Exhibit G—Application for Pension, dated Dec. 8, 1933 (Portion of)	203
Exhibit H—(Also Pltfs. Ex. 12)—Application for conversion of Insurance, dated June 21, 1927 (Portion of)	206
Exhibit J—Sworn statement by insured, dated Sept. 7, 1928 (Portion of)	208
Exhibit K—Statement by insured, dated Oct. 10, 1928 (Portion of)	209
Exhibit L—Supplementary statement by insured, etc. (Portion of)	210
Exhibit M—Statement by insured, dated Dec. 8, 1933.	211
Exhibit Q—Sworn statement of Dr. L. Grant Glickman, dated Sept. 7, 1928 (Portion of)	214
Motion for Judgment, etc., filed April 26, 1940.....	215
Verdict, filed April 17, 1940	218
Motion and Notice by Plaintiff for Judgment on Verdict, filed April 22, 1940	218
Opinion on motions after Verdict, filed May 7, 1940..	219
Supplemental Opinion, filed May 8, 1940.....	223
Order for Judgment, entered May 28, 1940.....	225
Notice of Appeal, filed Aug. 26, 1940.....	227
Order extending time to file record on appeal.....	227
Designation of Record	228
Clerk's Certificate	230
Stipulation as to Printing	231
Statement of Points.....	233
Additional Designation of Record.....	235
Clerk's Supplemental Certificate.....	237

IV

	Original	Print
Proceedings, in U. S. C. C. A., Seventh Circuit.....	238	239
Caption (omitted in printing) ..	238	
Order as to printed record	239	239
Motion to dismiss or affirm	240	239
Affidavit of Harriett V. Pence	242	240
Answer to motion to dismiss or affirm	246	242
Statement of points urged upon appeal (copy)		
(omitted in printing)	250	
Order denying motion to dismiss or affirm, etc.....	253	245
Recital as to filing of statement of points.....	253	245
Order granting leave to file typewritten briefs and		
denying motion to renew motion to dismiss, etc.....	254	245
Minute entry of argument and submission.....	254	246
Opinion, Sparks, J.	256	246
Dissenting opinion, Kerner, J.	263	253
Judgment	264	254
Recital as to filing of petition for rehearing.....	264	254
Order denying petition for rehearing.....	265	254
Motion for order staying mandate.....	266	255
Order staying mandate	268	255
Clerk's certificate (omitted in printing) ..	269	
Order allowing certiorari	270	256
Order granting motion for leave to proceed in forma pau-		
peris	271	256

1 DISTRICT COURT OF THE UNITED STATES
For the Eastern District of Wisconsin.

United States of America, }
Eastern District of Wisconsin. } ss:

At a stated term of the District Court of the United States of America, for the Eastern District of Wisconsin, begun and held at the city of Milwaukee, in said district, on the first Monday (being the 1st day) of January, A. D. 1940;

Present the Honorable F. Ryan Duffy, District Judge, presiding;

Among other the following proceedings were had, to-wit:

Harriet V. Pence, }
Plaintiff, }
vs. }
United States of America, }
Defendant. }

Be it remembered that heretofore, to-wit: on the 5th day of August, A. D. 1939, came the plaintiff and filed her complaint against the defendant as follows:

2 Aug. 5, 1939. COMPLAINT filed as follows:

Filed
Aug. 5,
1939.

IN THE DISTRICT COURT OF THE UNITED STATES
For the Eastern District of Wisconsin.

Harriet V. Pence, }
Plaintiff, }
vs. } Civil Docket # 147.
United States of America, }
Defendant. }

Now comes the plaintiff, Harriet V. Pence, by Scheinfeld, Collins, Durant & Winter, her attorneys, and for a cause of action against the above-named defendant respectfully shows to the Court and alleges:

1. That she is a resident of the City and County of Mil-

waukee, State of Wisconsin, presently residing at #3014 West Pierce Street in said City; that she has resided in said City of Milwaukee for the last thirteen (13) years.

2. That she is the widow of the deceased soldier, Dr. Lawrence W. Pence, whose file number your plaintiff alleges on information and belief is XC-1437493; that said Lawrence W. Pence enlisted in the United States Army medical service at Fort Dodge, Iowa, on August 7, 1918, and was honorably discharged from said service on January 9, 1919. Plaintiff further alleges that on or about September 4, 1918, said Lawrence W. Pence applied for a policy of insurance with the United States Government and that said application was accepted and policy numbered K-711,035 was issued on the life of said Lawrence W. Pence by the United States of America; that said policy of insurance remained in force and effect and all premiums were paid thereon until the end of January, 1920, but that the policy lapsed on or about February 1, 1920, for non-payment of the premiums due thereon.

3. Plaintiff further alleges that on December 3, 1924, at Marshalltown, Iowa, Lawrence W. Pence made application to enter the medical service of the United States of America and was accepted and worked for the Government of the United States in said medical service until the time of his death on September 21, 1934; that for several years prior to his death said Lawrence W. Pence was employed in the medical service at the National Home at Wood, Milwaukee County, Wisconsin.

4. Plaintiff further alleges that on June 21, 1927, said Lawrence W. Pence applied to the United States Government for reinstatement of the policy of insurance numbered K-711,035; that on or about June 25, 1927, said Lawrence W. Pence was examined by Dr. Joseph H. Plant, physician at the National Home at Wood, Milwaukee County, Wisconsin, and was recommended by said Doctor for reinstatement as a first-class risk and said policy of insurance was, on July 1, 1927, reinstated and changed to a Five-Year-Convertible-Term Policy under the law; that said contract of insurance so entered into between the assured and the United States Government on July 1, 1927, was a Five-Year-Term Insurance policy which according to its provisions terminated on or about the 1st day of July, 1932.

5. That thereafter on or about the 29th day of June, 1932, pursuant to the privilege extended by the Govern-

ment of the United States of America the said Lawrence W. Pence did file an application for renewal of said Five-Year-Term Policy from the 1st day of July, 1932, to and including the 30th day of June, 1937.

6. That the Government of the United States of America entered into a contract of insurance with the said Lawrence Pence for the period of July 1, 1932 to June 30, 1937, pursuant to the terms of which and in consideration of the payment of the premiums demanded, the said Government of the United States of America promised and agreed to pay the said Dr. Lawrence Pence or his beneficiary under said contract the sum of Ten Thousand Dollars (\$10,000.00) in the event of the death of the said Dr. Lawrence Pence.

7. That on or about the 1st day of July, 1927, the said Dr. Lawrence W. Pence, under the terms and conditions of the policy issued to him at such time, obligated himself to pay to said United States of America the premiums as they became due, and that thereafter and on or about the 30th day of June, 1932, did obligate himself further to pay to the United States of America the premiums as they became due under the terms and conditions of the renewed policy of insurance issued to him at such time.

8. That during his lifetime the said Dr. Lawrence W. Pence did pay such premiums in the approximate sum of Fifteen Hundred Dollars (\$1500.00); that from said 1st day of July, 1932, until the date of his death, said insurance contract remained in full force and effect and all premiums due to the United States of America were duly paid in accordance with the terms and conditions of the insurance contract and the laws of the United States and the regulations of the Veterans Administration pertaining and supplementary thereto.

9. That the said Dr. Lawrence W. Pence died at the City of Milwaukee, County of Milwaukee, State of Wisconsin, on the 21st day of September, 1934.

10. That your plaintiff is the named beneficiary in said policy of insurance.

11. That within a reasonable time after the death of her husband, Dr. Lawrence W. Pence, your plaintiff made claim for the insurance moneys due her as the beneficiary under said insurance contract; that said claim was presented to the Veterans Administration, Washington, D. C., which disallowed said claim by letter dated the 5th day of June, 1935, and received by your plaintiff

on or about the 7th day of June, 1935, and that the same has not been paid.

12. That thereafter and on or about July 6, 1935, plaintiff herein instituted action against the United States of America on said policy for Ten Thousand Dollars (\$10,000.00), alleging that a disagreement within the contemplation of the War Veterans Act of 1924, as amended, existed between this plaintiff and the Government of the United States; that said action was begun in the District Court of the United States for the Eastern District of Wisconsin and was number 4652 of the Civil Docket; that on January 11, 1939, pursuant to motion made by the United States Government on or about March 30, 1938, the Honorable F. A. Geiger, Judge of said Court, granted the motion of the United States of America to dismiss said action so brought by the plaintiff on the alleged grounds that she had appealed to the Administrator of Veterans Affairs on June 13, 1935, from the disallowance of her insurance claim in a letter dated June 5, 1935, and signed by H. L. McCoy, Director of Insurance.

13. Plaintiff further alleges that no appeal was taken to the Circuit Court of Appeals of the 7th judicial Circuit of the United States from said order of the Federal District Judge dismissing her complaint; that on July 10, 1939, the Administrator of Veterans Affairs, Frank T. Hines, dismissed said plaintiff's appeal from the Administration's letter of June 5, 1935, by affirming the action taken

by the Veterans Administration Insurance Department on June 5, 1935; that attached hereto and marked "Exhibit A" is a copy of the letter of said Frank T. Hines, dated at Washington, D. C., July 10, 1939, affirming the action taken by the Insurance Claims Council as set forth in their letter of June 5, 1935, from which an appeal had been taken and was pending before the Administrator of Veterans Affairs; that the action so taken by said Administrator of Veterans Affairs on July 10, 1939, was a final disallowance of plaintiff's claim against the United States of America for the Ten Thousand Dollars (\$10,000) insurance due her from the defendant on said policy of insurance.

14. That a disagreement as contemplated under the provisions of the World War Veterans Act of 1924, with amendments, now exists between Harriet V. Pence, the beneficiary and widow of Dr. Lawrence W. Pence, de-

ceased; who is the plaintiff herein, and the United States of America.

15. Plaintiff further alleges that she is informed and believes that as the named beneficiary under the policy of insurance referred to she is lawfully entitled to and should receive from the Government of the United States of America the moneys which inured to her under said insurance contract, for the reason that she is the widow of said Lawrence W. Pence and the beneficiary under said contract of insurance.

Wherefore, plaintiff demands judgment against the defendant, United States of America, in the sum of Ten Thousand Dollars (\$10,000.00).

William B. Collins and
Scheinfeld, Collins, Durant & Winter,
Plaintiff's Attorneys.

P. O. Address: Room 828, 735 North
Water St., Milwaukee, Wis.

Harriet V. Pence.

7 State of Wisconsin, {
Milwaukee County. } ss.

Personally appeared before the undersigned authority, a notary public in and for Milwaukee County, Wisconsin, on the 4th day of August, 1939, Harriet V. Pence, the plaintiff in the above-entitled cause of action, who, being duly sworn as to the truth of the allegations made in the above complaint, says that she has read the foregoing complaint and knows the contents thereof and that the same is true to her own knowledge except as to matters therein stated on information and belief and that as to those matters she believes it to be true.

/s/ Elmer N. Bink,
Notary Public, Milwaukee County, Wis.

My commission expires Oct. 4, 1942.

EXHIBIT A.

Veterans Administration,
Washington,
July 10, 1939.

Pence, Lawrence W.
XC-1437493.

Mrs. Harriet V. Pence,
3412 West Highland Boulevard,
Milwaukee, Wisconsin.

My dear Mrs. Pence:

Messrs. Scheinfeld, Collins, Durand and Winter, your representatives, have requested that you be furnished with a letter of denial for the purpose of instituting litigation proceedings.

The records in this case disclose that Government Life Insurance Policy K-711,035 was issued to this veteran because of fraudulent misrepresentations made by him in connection with his application for reinstatement dated June 25, 1927. Therefore, the disallowance of your claim as set out in the Administration's letter to you on June 5, 1936, must be and is hereby affirmed.

Very truly yours,

(signed) Frank T. Hines,
Administrator.

Endorsed: Filed Aug. 5, 1939. B. H. Westfahl, Clerk.

9 September 22, 1939—MOTION AND NOTICE OF
MOTION OF DEFENDANT TO STRIKE POR-
TIONS OF COMPLAINT, filed as follows:

Filed
Sept. 22,
1939.

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—147) * *

To: Messrs. Scheinfeld, Collins, Durant & Winter,
Attorneys at Law,
First Wisconsin National Bank Bldg.,
Milwaukee, Wisconsin.

Please Take Notice that on the 2nd day of October, 1939,
at 10 o'clock in the forenoon of said day, or as soon there-
after as counsel can be heard, the attached motion to strike
will be brought on for hearing before the United States
District Court for the Eastern District of Wisconsin on
the Third Floor, Federal Building, 517 East Wisconsin
Avenue, Milwaukee, Wisconsin.

Dated this 21st day of September, 1939.

B. J. Husting,

United States Attorney.

By E. J. Koelzer,

E. J. Koelzer,

Assistant United States Attorney.

10 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—147) * *

MOTION TO STRIKE.

Now comes the defendant, United States of America,
and moves the Court to strike the following from the
plaintiff's complaint:

(1) Defendant moves to strike all of Paragraph 3 of
the complaint on the ground that said paragraph is im-
material and irrelevant to the cause of action sued upon,
and is evidentiary in character.

(2) Defendant moves to strike that portion of Para-
graph 4 of the complaint, beginning with the words, "that

on or about June 25, 1927", appearing on line four of said paragraph, to and including the words, "as a first-class risk"; for the reason that said portion which defendant requests be stricken is evidentiary in character and as such is incompetent and not material to the issues in this cause.

B. J. Husting,

B. J. Husting,

United States Attorney.

By: E. J. Koelzer,

E. J. Koelzer,

Asst. U. S. Attorney.

Endorsed: "Filed Sept. 22, 1939. B. H. Westfall,
Clerk."

Entered
Oct. 2,
1939. 11. Oct. 2, 1939—ORDER STRIKING CERTAIN PORTIONS OF COMPLAINT, filed as follows:

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—147) * * *

This matter having come on before the Court on the 2nd day of October, 1939, upon the motion of the defendant, United States of America, to strike certain portions of the plaintiff's complaint set forth in said motion, the defendant appearing by E. J. Koelzer, an Assistant United States Attorney, and the plaintiff appearing by William B. Collins, and arguments having been heard, and the Court being sufficiently advised, on consideration thereof,

It Is Hereby Ordered that defendant's motion to strike be and the same is hereby granted, and that paragraph 3 of plaintiff's complaint, and all of said paragraph 3, and that portion of paragraph 4 of said plaintiff's complaint, beginning with the words, "that on or about June 25, 1927", appearing on line four of said paragraph, to and including the words, 'as a first-class risk', be and the same hereby is stricken from said complaint.

Dated at Milwaukee, Wisconsin, this 2nd day of October, 1939.

By the Court,

F. Ryan Duffy,

Judge.

Endorsed: Filed Oct. 2, 1939. B. H. Westfahl, Clerk.

12 Oct. 11, 1939—ANSWER OF DEFENDANT, filed as follows: Filed
Oct. 11,
1939.

IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—147) • •

ANSWER.

Now comes the defendant, the United States of America, and for answer to plaintiff's complaint alleges:

(1) The defendant denies for want of information and belief the allegations contained in Paragraph 1 of plaintiff's complaint.

(2) The defendant admits the allegations contained in Paragraph 2 of plaintiff's complaint.

(3) The defendant admits the allegations contained in Paragraph 4 of plaintiff's complaint.

(4) The defendant denies the allegations contained in Paragraph 5 of plaintiff's complaint, except that it admits that on June 29, 1932, Lawrence W. Pence filed application for a five-year Convertible Term Policy in the amount of \$10,000.

(5) The defendant admits the allegations contained in Paragraph 6 of plaintiff's complaint.

(6) The defendant admits the allegations contained in Paragraph 7 of the plaintiff's complaint.

(7) The defendant denies the allegations contained in Paragraph 8 of the plaintiff's complaint.

(8) The defendant admits the allegations contained in Paragraph 9 of the plaintiff's complaint.

13 (9) The defendant admits the allegations contained in Paragraph 10 of the plaintiff's complaint.

(10) The defendant admits the allegations contained in Paragraph 11 of the plaintiff's complaint.

(11) The defendant admits the allegations contained in Paragraph 12 of the plaintiff's complaint.

(12) The defendant admits the allegations contained in Paragraph 18 of the plaintiff's complaint.

(13) The defendants neither admits nor denies the allegation contained in Paragraph 14 for the reason that the allegation set forth in said paragraph pertains to a matter solely within the jurisdiction of this Court.

(14) The defendant admits the allegations contained in Paragraph 15 of the plaintiff's complaint.

(15) Further answering, and by way of affirmative defense, the defendant alleges that on or about June 25, 1927, Dr. Lawrence Pence made application for the reinstatement of his yearly renewable term insurance which had lapsed for non-payment of premium due February, 1920. The request for this reinstatement was made under good health regulations, which provided that lapsed insurance may be reinstated provided that the applicant is in good health and presents evidence to that effect. That the defendant was induced to make and deliver the policy and become insurer as alleged in said complaint by the false and fraudulent statements and misrepresentations made by Dr. Lawrence Pence to the defendant of a fact then material

to be known to the defendant and material to the risk
14 of the said policy, that is to say: that on the application for reinstatement, he stated that he had never been treated for any disease of the throat or lungs, brain or nerves, heart or blood vessels, stomach, liver, intestines, kidney or bladder, glands, skin, ear or eye, or bones. The defendant relied upon the statements of the applicant and issued a policy in the amount of Ten Thousand Dollars (\$10,000) effective as of July 1, 1927. The defendant alleges that said statements made, and which formed the basis of said insurance, were untrue in this, that prior to June 25, 1927, the said Lawrence Pence was suffering from and had been repeatedly and continuously treated by physicians and surgeons for sinusitis, chronic ethmoiditis and myocarditis, all of which diseases tend to shorten life, and are material facts to be considered in the issuance of any policy of insurance. The defendant further alleges that the principal causes of the death of the said Lawrence Pence were these same diseases which existed prior to the date of the application for the reinstatement and which were then well known to exist by the said Lawrence Pence but which he fraudulently failed and refused to disclose at the time of said application for reinstatement and the existence of which in truth and in fact he affirmatively denied with intent to thereby deceive and defraud the defendant.

Wherefore, having fully answered, defendant prays for judgment against the plaintiff, with costs, and for such other and further relief as may to the Court seem meet and proper, the premises considered.

B. J. Husting,

United States Attorney.

E. J. Koelzer,

Assistant United States Attorney.

Endorsed: "Filed Oct. 11, 1939. B. H. Westphal, Clerk."

15 Dec. 26, 1939—Plaintiff's demand for jury trial, filed as follows:

Filed
Dec. 26,
1939.

IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—147) • •

DEMAND FOR JURY TRIAL.

To the Defendant Above Named, United States of America, and B. J. Husting, United States Attorney, and E. J. Koelzer, Assistant United States Attorney, its attorneys:

You and each of you will please take notice that the plaintiff, Harriet V. Pence, in the above entitled cause demands a jury trial in all of the issues involved in this lawsuit.

/s/ William B. Collins and
Scheinfeld, Collins, Durant & Winter,
Attorneys for the Plaintiff.

Service of the foregoing notice of plaintiff's demand for jury trial received and hereby personally acknowledged this 23rd day of December, 1939:

/s/ B. J. Husting,
United States Attorney.

/s/ By E. J. Koelzer, *Assistant.*

Endorsed: "Filed Dec. 26, 1939. B. H. Westfahl, Clerk."

17 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—147) • •

TRANSCRIPT OF PROCEEDINGS OF TRIAL.

Be It Remembered that heretofore, to-wit, commencing on Monday, April 15, 1940, at ten o'clock A. M. of said day, the above entitled matter came on for trial before the Honorable F. Ryan Duffy, Judge of said Court, and a jury, upon the pleadings heretofore filed herein.

Appearances:

William B. Collins, Esq., appearing on behalf of the plaintiff;

William L. Lytle, Esq., of the War Risk Bureau, Attorney for the Department of Justice, appearing on behalf of the Government; and E. J. Koelzer, Esq., Assistant District Attorney..

18 Mr. Koelzer: Plaintiff is ready.

If the court please, we move for the admission in this case of Mr. William L. Lytle, of the War Risk Bureau, attorney for the Department of Justice, for litigation purposes of this case.

The Court: Admitted for the purposes of this case.

Call the jury.

(Jurors duly sworn as to qualifications.)

The Court: Counsel for the plaintiff will make a statement briefly outlining what the case is about and the names of the parties involved and the counsel, so far as might be known to the jurors.

Mr. Collins: May it please the court—

The Court: Mr. Collins.

Mr. Collins: Ladies and Gentlemen of the Jury: This is an action on an insurance policy against the United States Government. It is what is known as a Veteran's Policy, five-years convertible term policy on the life of Lawrence W. Pence. Will you rise, Mrs. Pence?

(Lady stands.)

Mr. Collins: The plaintiff is the lady who is in the

first row over there, Mrs. Harriet V. Pence. The
19 United States Government wrote this insurance. The
counsel for the United States Government is Mr. Lytle,
and I am counsel for the plaintiff. My name is William B.
Collins.

(Jury duly sworn to try the issues in the case and render
a true verdict according to the evidence.)

The Court: Assuming this case goes to the jury, how
long do you expect it to take?

Mr. Lytle: I have about a day and a half, your honor.
I think I have the burden of proof.

The Court: Yes, I think so.

I ask the defendant counsel: I notice in your pleadings
that you deny that the plaintiff is a resident of the City
of Milwaukee presently residing at 3014 West Pierce
Street and that she resided there for thirteen years. You
do not mean to make any contest on that point, I assume.

Mr. Lytle: No.

The Court: The agreeable controversy in this case is not
whether the policy was in existence but whether it was ob-
tained by false representations.

Mr. Lytle: Exactly; whether it was a valid policy in
force.

Mr. Collins: There is one other question we ought
20 to settle right now.

I think in one of our allegations we stated that the
premiums on the policy were paid and, at the time Mr.
Pence died, the policy was in full force and effect. Now, I
notice counsel denied that and, perhaps, denying that para-
graph and putting this to our proof, I don't know whether
he means we ~~didn't~~ pay the premiums and keep the policy
alive, or whether he just merely means to deny—

The Court: I assume that you didn't want to admit the
validity of the policy by admitting that. There is no ques-
tion about the actual payment of the premium.

Mr. Lytle: I will stipulate to the facts and we will have
those out of the way, if counsel will agree.

Mr. Collins: Yes, sir.

The Court: Just stipulate the facts.

Mr. Lytle: You check them.

It is stipulated by and between counsel for the respective
parties of this lawsuit that Lawrence W. Pence enlisted in
the military service of the United States as a lieutenant on
August the 7th, 1918, and was assigned to active duty on

September the 1st, 1918, and discharged from said military service on January the 9th, 1918 (1919).

21 It is further stipulated that while in the military service during said enlistment, the said Lawrence W. Pence applied for, to the defendant, the Government, and was granted, a War Risk, yearly renewable, insurance policy in the sum of \$10,000, on which premiums were paid by the deduction from his monthly military service pay, and after discharge by direct payment, to the U. S. Veterans Bureau, until up to and including the month of January, 1920, but none thereafter; and that said contract of insurance, of yearly renewable term insurance, therefore lapsed for non-payment of premiums on February the 1st, 1920, and ceased to be in full force and effect after the expiration of 31 days, on March 2, 1920; that on June 21, 1927, the said Lawrence W. Pence executed an application for reinstatement of the full \$10,000 yearly renewable term insurance contract and on the same date, namely, June the 21st, 1927, executed application to convert the said yearly renewable term insurance contract to a \$10,000 United States Government life converted five-year convertible term insurance policy, five-year renewable convertible term insurance policy; that premiums were paid on the said alleged reinstated converted insurance contract—that the said contract became effective July the 1st, 1927, and premiums
22 thereon were paid up to and including the month of August, 1934, but none thereafter; and that he died on September the 21st, 1934.

Do you want to stipulate the cause of death?

Mr. Collins: I don't think anybody knows the cause of death.

The Court: I think there should be one correction. You said he was honorably discharged January 9, 1918; you mean January 9, 1919.

Mr. Collins: That is right; and he didn't say "honorably discharged." I would like to have it honorably discharged.

Mr. Lytle: I don't think it is relevant; but, however, I am willing to stipulate it.

The Court: It is stipulated he was honorably discharged on January 9, 1919.

Mr. Collins: Do you stipulate the death on the 21st was within—

Mr. Lytle: I will stipulate that the last premium was

paid for August, 1934; and the policy, if valid, would have been continued in force by reason of the 31-day grace period up to and including midnight of October 1, 1934.

The Court: All right. It is stipulated that the policy if valid was in force and this last premium of payment
23 would have been sufficient to have it in force, but the question is whether it was validly existing.

Mr. Lytle: That is right.

The Court: Well, in that case then, I suppose now the burden of proof is entirely on the government, is it not? Haven't we stipulated enough for Mr. Collins to have a prima facie case? Of course, if he desires—you might make your statements, anyway, to the jury as to what the case is about.

Mr. Collins: I think that our prima facie case, in addition to this stipulation, will be very limited.

The Court: Go ahead. Make your statement, Mr. Collins, and then the government will make its case statement.

(Opening statement by Mr. Collins for the plaintiff, and opening statement by Mr. Lytle for the defendant.)

The Court: We will recess for about ten minutes. Come back here in ten minutes.

(Jury retires from the court room.)

(Whereupon a short recess was had.)

After Recess.

(The jury returned to the court room and the following proceedings were had:)

Mr. Collins: I would like to have the policy of insurance in this case marked for identification.
24

The Court: You may do so.

Mr. Collins: I would like to have the certificate of renewal by the United States Government, dated July 1, 1932, marked as Plaintiff's Exhibit No. 2.

The Court: All right.

Mr. Collins: I now offer in evidence Plaintiff's Exhibit 1, the policy; and Plaintiff's Exhibit 2, carrying the insurance from 1932 to 1937.

The Court: They will be received.

(Said Plaintiff's Exhibits 1 and 2, so offered, were thereupon received in evidence.)

Mr. Collins: Harriet Pence, will you take the stand, please?

MRS. HARRIET V. PENCE, the plaintiff, called as a witness herein, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Collins.

Q. Mrs. Pence, you are the plaintiff in this action?

A. I am.

Q. And you are the widow of Lawrence W. Pence?

25 A. I am.

Q. Deceased. When and where did your husband, Lawrence W. Pence, die?

A. He died at the Veterans' Administration where we lived in the quarters, here at Milwaukee, September 21, 1934.

Q. I don't believe they can all hear you.

A. He died at the Veterans' Administration where our quarters were out there—the doctor worked at Milwaukee, known as Wood, Wisconsin—on the morning of September 21, 1934.

Q. And he had a policy of insurance, with the United States Government which was extended from '32 to '37, and is shown by Exhibits 1 and 2, did he not?

A. That is right.

Q. Who attended to paying the premiums on this policy?

A. Well, I most always wrote the checks and saw to it that it was always in.

Mr. Lytle: I object to the question as incompetent, irrelevant and immaterial.

The Court: Objection sustained. It is admitted by the stipulation that all of the necessary premiums were paid. He had kept the policy in effect providing it was validly existing. Don't go into any of those matters that you
26 have already stipulated about.

Mr. Collins:

Q. You made claim for—strike it.

(Question waived.)

Q. You are named as the beneficiary of this policy of insurance, are you not?

A. Yes, I am.

Q. And do you know whether it was to be paid in instalments or in one lump sum?

A. It was to be in one sum after it was converted over, I understood. First, it was \$57.50 a month.

Q. Was there anyone other than you that was to share in the proceeds of this policy?

A. No, sir.

Mr. Lytle: If your honor please, I don't like to object. The policy stands for itself.

The Court: The answer may stand. Objection overruled.

Mr. Collins:

Q. You made claim against the government about October 2, 1934, for payment of this government life insurance, did you not?

A. I did.

Q. Was the insurance disallowed by the government and, if so, about when?

A. Well, I didn't hear anything for almost ten months from them until I finally got senatorial and congressional pressure to give me an answer at all.

Mr. Lytle: I move the answer be stricken.

The Court: The answer will be stricken. Answer the questions. Don't volunteer anything.

A. I am sorry.

28 Mr. Collins: The first part of the answer—

The Court: Well, the first part may stand, but the latter part is stricken out.

Mr. Collins:

Q. About June fifth, 1935, you received a letter denying your claim, did you not?

A. I did.

Q. And the first suit was dismissed by the Honorable Ferdinand Geiger about January 11, 1939, was it not?

Mr. Lytle: If your Honor please, I don't think that has got anything to do with this.

The Court: It hasn't but I think she might answer. The records of the Court show, but let the answer be considered as yes.

Mr. Collins, what is the use of going into matters that have been admitted by the stipulation, that there is no controversy about? I have instructed the jury that you have acted as promptly as you possibly could in bringing this suit. The other suit was disallowed because the Government held there was no final disagreement.

Mr. Collins:

Q. At the time the policy lapsed with the Govern-
29 on or about February first, 1920, where were you and Mr. Pence living?

A. We were living at State Center, Iowa, and Fertile, Iowa. The northern part of the state; those two towns during that time.

Q. What was he doing there?

A. Private practice.

Q. As a physician?

A. Yes.

Q. Did he stay at home during that time, that interval from the time that policy lapsed on February first, 1920 down to the time of the reinstatement on July first, 1927?

A. Yes.

Q. And did you know—do you know the state of his health during that time?

A. I think I should.

Mr. Lytle: I object to that. The witness here isn't qualified.

The Court: Objection overruled.

Mr. Collins:

Q. Was Dr. Pence sick at any time during the time that you lived at State Center and Fertile Iowa after the
30 lapse of the policy about February first, 1920?

A. No, not any at—

Mr. Lytle: (Interposing.) For the record, I object to the question as having no bearing on the issues involved. He asked whether or not he had been sick. The issue involved in this case is whether he had a physical defect, and, furthermore, the witness is not qualified to know.

The Court: Objection overruled. The witness may answer.

Mr. Collins:

Q. From the date of the lapse of this policy about February first, 1920 to the date on the policy it was reinstated on July first, 1927, do you ever recall that Dr. Pence was at home or confined to his bed with any illness?

A. No, outside of colds. That is the only sickness, the only thing that he ever at any time ever had.

The Court:

Q. As far as you know?

A. Yes. I was right there. I never served him a meal in bed in his life.

Mr. Collins:

Q. Now, Dr. Pence went back into the Government service at Sioux Falls, South Dakota about March first, 1925; is that right?

31 A. That is right.

Q. And did you live with him there at Sioux Falls, South Dakota?

A. Yes.

Q. And how many children have you by the marriage with Dr. Pence?

A. Two children.

Q. What are their names?

A. Holley and Robert.

Q. Holley and Robert?

A. A daughter and a son.

Q. The daughter is married and lives in Iowa?

A. That is right.

Q. And the son lives here in Milwaukee with you?

A. Yes; I live with him.

Q. You live with him. How long did you stay at Sioux Falls, South Dakota, or how long was the doctor stationed there?

A. Well, he was stationed there from March, 1925, I believe it was, until the following January.

Q. About January first, 1926. Where did he go?

A. Fort Thomas, Kentucky, in the Government hospital there.

Q. And how long did he stay at the Veterans' Hospital at Fort Thomas, Kentucky?

A. Until April first when that hospital closed.

Q. Until April first, 19—?

32 A. 1926.

The Court: He went there in July, the first, 1926. You must have the date wrong. I thought it was July first, 1925, wasn't it?

Q. He went back in the Government Service in July, the first, 1925?

Mr. Collins: No. I think that—

Q. He went back in the Government service on April first, 1925?

A. March first.

Q. March first, 1925.

A. Yes.

Q. That is when he went to Sioux Falls?

A. That is right.

Q. And he stayed at Sioux Falls until January 1, 1926?

A. That is right.

Q. And then he was transferred to Fort Thomas, Kentucky?

A. Yes.

Q. And he stayed there until the hospital there closed on April the first, 1926?

A. That is right.

Q. Where was he transferred to from the hospital at Fort Thomas, Kentucky?

A. He entered—he applied for the service known
33 as the National Home at Milwaukee then. It is now consolidated to the Veterans Administration and he went there.

Q. It is called the National Home?

A. It used to be called the National Home.

Q. And how long did he stay at the National Home that time at Milwaukee?

A. Well, from April first until the first of August.

Q. All right. And where did he go on the first of August, 1926?

A. At the National Military Home at Leavenworth, Kansas. A Government hospital just like this.

Q. And he remained at the National Home, Western Home in Kansas at Leavenworth, from August first until what date?

A. Until June first, 1927.

Q. And where did he go after June first—around June first, 1927?

A. Transferred back here to Milwaukee hospital here.

Q. To the National Home at Milwaukee?

A. Yes.

Q. And from June first, 1927, to the date of his death, September 21, 1934, where was he stationed?

A. At Milwaukee here.

Q. Was Dr. Pence—how tall a man was Dr. Pence and how heavy a man was he?

34 A. I think he weighed about 150-or-60 pounds, and he was about—well I think he was a little bit taller than I am, about five-foot-six, I should say.

Q. And what is the date of his birth as you know it?

A. 1876, I believe, June—or August 22nd.

Q. Did the doctor lead a sedentary life or was he active?

A. Well, he liked the outdoors. He liked to golf and garden and fish and hunt. They were really his hobbies whenever he had time off from work.

Q. At State Center, the place that you lived at, the time the policy lapsed in 1920, what did the doctor have to occupy his attention outside of office hours there?

A. We have had plenty—an acre in ground in garden that he always took care of. He got up early in the morning before he went to the office.

Q. When did he work in that garden?

A. In the mornings and evenings.

Q. And he went from State Center, Iowa, up to a little town known as Fertile, Iowa?

A. Two years I think we were there. That is right.

Q. And what, if anything, did the doctor do to occupy his time outside of the office hours at Fertile, Iowa?

35 A. Well, it was a big country practice. There was lots of riding in the country, and, then, we also had a large garden there. We always had a garden where we could.

Q. Was he well when you were at State Center, Iowa?

A. He was always well.

Q. Was he well when you were at Fertile, Iowa?

A. He was apparently well.

Mr. Lytle: I move to strike the witness' answer as it is too general and the witness is not qualified.

The Court: Well, "he was apparently well" is the answer as I understood it. It may stand. Objection overruled.

Mr. Collins:

Q. The doctor took an examination sometime in December, 1924, before he went back into the Government service in March, 1925, did he not? Do you know that?

A. 1924—no, I don't know about that.

Mr. Collins: Have you that examination here?

Mr. Lytle: What is that?

Mr. Collins: The examination of Dr. Pence on December 3, 1924 when he applied back into the Government service.

Mr. Lytle: I have called the Veterans' Bureau, but
36 I don't know of any such as that. Do you mean the Civil Service application?

Mr. Collins: I mean the application that Dr. Pence made when he attempted to go back into the service on December 3, 1924. He answered certain questions, and he was examined.

Mr. Lytle: I haven't anything. If you tell me what date it was—

The Court: (Interposing.) Well, we will recess in about five minutes, so you can go to something else and then you can confer with counsel and agree on it.

Mr. Collins:

Q. You were with the doctor when he was stationed at Sioux Falls, South Dakota, were you not?

A. I was.

Q. Were you with the doctor between January first, 1926 and April first, 1926 when he was at Fort Thomas?

A. No, I wasn't at Fort Thomas because the children were in school in Sioux Falls, and I just stayed there.

Q. And when he was transferred from Fort Thomas in April, 1926 back here, or to the Milwaukee Home, the Veterans Home at Milwaukee, or the National Home, did you come to Milwaukee?

A. I came directly with him and left my daughter
37 there too. She graduated all by herself, with nobody with her. I came here.

Q. And then you lived with him all the time, his first stay at Milwaukee, from April to August, 1926?

A. Yes.

Q. And state whether or not you lived with him when he went on August 1, 1926, down to the Western Home at Leavenworth, Kansas.

A. Yes, I was always along.

Q. And the family went down there with him?

A. Yes.

Q. And state whether or not you came back with him from the Western Home at Leavenworth, Kansas, about June 1, 1927, and lived with him here at the home.

A. Yes, I did.

Q. And barring a few times when he went hunting or fishing, or a little vacation, were you with him constantly?

A. I usually went fishing, too.

Q. You did. Now, in the period when the doctor was at Sioux Falls, South Dakota, on his first assignment, when he was reinstated in the medical corps of the United States, was he sick, or did he have any doctor?

A. No, he was not sick.

38 Q. When the doctor was down at Fort Thomas, Kentucky, you weren't with him, or did you hear of his being sick down there?

A. No.

Mr. Lytle: I object.

The Court: Sustained.

Mr. Collins:

Q. Well, when the doctor came back to Milwaukee on April 1, 1926, you were with him and until he departed in August for Leavenworth, was he sick during that period?

A. No, he wasn't.

The Court: Well, now, we will understand that your questions—otherwise I will sustain the objection—when you ask whether he was sick, it is whether he was apparently sick, as this woman isn't any doctor.

Mr. Collins: Yes.

The Court: She doesn't know. What was his apparent condition they can give, and that is all.

Mr. Lytle: That is the basis on which I object and move the jury be instructed to that effect.

The Court: Of course, the jury will understand that this witness is not a medical expert, having no qualifications as such, and the court is permitting her to answer merely as to the apparent condition of her husband, what would be known to one who had been constantly with him. Of course, she cannot pass on whether it might be some functional disorder, or something other of that kind, which she wouldn't know about.

39 Well, we will recess until two o'clock, ladies and gentlemen. Be here promptly. Everybody wait until the jury has left the box.

I will have the attorneys in at one-thirty in my chambers.

Mr. Lytle: Yes, your honor.

The Court: The clerk will take care of the exhibits.

(Whereupon a recess was taken at two o'clock P. M. of the same day.)

Milwaukee, Wisconsin
Monday, April 15, 1940,
2:00 o'clock P. M.

Court met pursuant to recess last above noted.

All parties present.

(Jury in the box.)

HARRIET V. PENCE, the plaintiff, called as a witness herein, resumed the stand and was examined and testified further as follows:

Direct Examination by Mr. Collins (Cont'd).

The Court: Proceed.

Mr. Collins:

Q. I show you, Mrs. Pence, what purports to be an application for reinstatement of yearly renewable term insurance, and the name at the top—

Mr. Lytle: Pardon me. Has that been marked for identification?

Mr. Collins: I am going to identify it, first.

Q. I show you a signature in the lower left-hand corner, and ask you if that is your husband's signature?

A. It is.

41 Q. Is that in his handwriting?

A. It is.

Mr. Collins: We ask that this application for reinstatement be marked as a plaintiff's exhibit for identification.

Mr. Lytle: No objection.

The Court: It will be received.

Mr. Collins: We offer it in evidence.

The Court: It will be received.

(Said Plaintiff's Exhibit, so offered, was thereupon received in evidence.)

Mr. Collins:

Q. Now, question No. 5 on this application for reinstatement is as follows:—By the way, to get the time in mind, the application is dated the 21st day of June, 1927, is it not?

A. That is right.

Q. Question 5 is as follows: "Are you now in as good health as you were at the due date of the premium in the fall?" and the answer is: "Yes," is that right?

Mr. Lytle: If your honor please, I don't know how this witness can testify as to whether the answers of her husband are right or wrong.

Mr. Collins: It is in the exhibit.

42 The Court: I understand whether the answer appears there, yes. It was so signed, of course; it shows for itself. I understand it is yes, and we will let it go at that.

A. Yes.

Mr. Collins:

Q. Now, you were familiar with Dr. Pence's health on February 1, 1920, when the premium was in default and the original policy lapsed, were you not?

A. Yes.

Q. You were then living where?

A. State Center, Iowa.

Q. And the doctor was in practice there at that time?

A. Yes, he was.

Q. Now, on June 21, 1927, when this question was answered, and this application for reinstatement made, what would you say about the condition of Dr. Pence's health as related to his health at the time the policy lapsed?

A. He was—

Mr. Lytle: I object unless it is qualified as your honor qualified it.

The Court: Objection sustained. The answer will be stricken. I pointed out, Mr. Collins, that this lady
43 can't testify as an expert as to a person's condition of health. She can only testify as to what is apparent to a layman. If you qualify your questions to that extent I will permit her to answer; otherwise, the objection must be sustained.

Mr. Collins: Of course, the witness is a layman and we don't claim she has any medical qualifications, but, as I understand the rule of law, a lay witness may testify in regard to health and that lay witness may give her conclusion in regard to health for the reason as pointed out in numerous cases in the Supreme Court of Wisconsin, that a lay witness has a very good idea of health; but if they were asked specifically to detail the various things

on which they formed that conclusion, they would not be able to do it.

The Court: Now, it is up to you to do either as I have ruled and ask the question as to the apparent condition of health, or don't ask the question at all.

(Pending question read by the reporter.)

Mr. Collins: I amend that question by putting in, what was the apparent condition of Dr. Pence's health.

The Court: She may answer that question.

Mr. Collins:

Q. How it appeared to you?

44. A. It appeared to be good.

The Court: The question is, how does it appear to be as compared with the date on February 1, 1920, when the policy lapsed.

A. Just the same.

Mr. Collins:

Q. Now, question 6 here—well, skip that. Question 7, which is in this application of June 21, 1927: "Have you been ill or contracted any disease or suffered any injury or been prevented by reason of ill health from attending your usual occupation, or consulted a physician in regard to your health since the lapse of this insurance (answer yes or no)."

"A. No." From your knowledge of Dr. Pence and his apparent state of health, as a lay witness what would you state as to whether or not the answer to that question is true or false?

Mr. Lytle: If your honor please, I have to object to that for obvious reasons.

The Court: Objection sustained.

Mr. Collins:

Q. Between the time of the lapse of this policy, on or about February 1, 1920, and the date of the application for reinstatement, June 1, 1927, did Dr. Pence, Lawrence

45 W. Pence, to your knowledge, consult any physician with regard to his health?

A. Not to my knowledge.

Q. What is that?

A. No, not to my knowledge.

Q. Did he suffer any injury?

A. No.

Q. In that period. Did he contract any diseases in that period?

A. No.

Q. Was he incapacitated by sickness at any time during that period?

A. Nothing, only a usual cold. That is the only sickness he has ever had.

Q. Was he ever confined to bed in that period?

A. No, never.

Q. Just prior to his death, September 21, 1934, Dr. Pence was working where?

A. Government hospital here at Milwaukee.

Q. And did he lose any time from his work in the month, September, 1934, just prior to his death?

A. Yes. I think it was about two or three days he was home with a cold.

Q. On September 20, 1934, which is the day before 46 the date listing the death on the certificate for his death, did he go to work?

A. Yes, he worked all that day, and I rather think the day before, but I am not sure about that; but he worked the day of the 20th all day till closing time of four-thirty.

Q. And what was the apparent state of his health when he came home that night?

A. He seemed to be all right when he came home.

Q. When did you last see him alive?

A. About eight o'clock he said he was going to retire. He had a little distress in his stomach. He didn't feel so good and he was going to go to bed. He always went to bed early, anyway.

Q. Who found him dead?

A. Well, there was several—I don't remember which one came first. We, quick as we found him, we called them, and we were really all in there.

Q. I mean, Dr. Pence went to bed, you say, about eight o'clock that night of the 20th?

A. Yes.

Q. And did you call him?

A. Oh, yes, I found him the next morning. Yes. I got breakfast ready and he didn't come down, and I thought it was unusual, and I went up to call him.

47 Q. Did he have any doctor attending him for the sickness he had a few days prior to his death?

A. No, not that I remember of.

Q. You have a son named Robert Pence, have you not?

A. Yes.

Q. How old is he now?

A. He is 26.

Q. 26?

A. Yes.

Q. Was Robert Pence making his home with you right along?

A. He was in the navy four years. He went in in December.

Q. I mean while Dr. Pence was alive?

A. Until from December until September he was in the navy.

Q. Well, you don't get my question. What date did he go into the navy?

A. December 12.

Q. What year?

A. '33.

Q. Up to that time had your son, Robert Pence, been home?

A. Yes.

Q. Now, you have a step-son that was in the home, too, have you not?

48 A. Yes.

Q. What is his name?

A. Lawrence Waldo Pence.

Q. Was Waldo Pence living with you at State Center and Fertile?

A. Yes, all the time.

Q. And was he with you up at Sioux Falls?

A. Yes, part of the time. He was in school at times, and he came home for the usual vacations.

Q. Did he also live with you out here at the home?

A. All the time out here.

Q. Now, whom did Dr. Pence go hunting and fishing with?

A. Well, he went with Mr. Warner, a friend of ours, and with some of the doctors occasionally.

Q. Will you state whether or not there was any plan on the part of Dr. Pence and Mr. Warner to go hunting any time the month of September, 1934?

Mr. Lytle: Well,—

A. They were going Saturday at noon, the day—he died on Saturday and they were going the next day noon.

because he had a few days' leave—I think it was five—and I think the partridge season was open and they were going for a few days' fishing then, or hunting.

49 Mr. Collins:

Q. What does Mr. Warner do?

A. He is a high school teacher.

Q. In West Division High School?

A. Yes.

Q. Is he here in court?

A. Yes, sir.

Q. State how closely he was associated with Mr. Pence and you prior to Mr. Pence's death.

A. Well, he was in and out of the home probably two or three times a week, and he picnicked, fished, golfed, and they were intimate friends of ours.

Q. And when Mr. Pence got out here in Milwaukee, he didn't have a garden, did he?

A. No, sir. There was no place.

Q. What exercise did Mr. Pence, the late Dr. Pence, take while he was here at the home in Milwaukee?

A. Played golf and mowed the lawn.

Q. How did the lawn compare in size, or what kind of a lawn was it?

A. Well, it was pretty good sized, and rather tough grass.

Q. What is the custom out there with the lawns of
50 the doctors about the home?

A. Well, they were usually mowed by the soldiers that were in the home, but he got permission to mow his own lawn; he said he would like to take care of it and liked the exercise. And he, I think, was the only one there that did his own lawn-mowing because he wanted to and liked to.

Q. During the summer of 1934, and up to the time of Dr. Pence's death on the 21st of September of that year, can you recall any time when that lawn was mowed by anyone other than Dr. Pence?

A. No, I don't think it was.

Q. Did Mr. Warner ever help him?

A. Well, I don't remember about that. He might have helped him some. They were out in the yard together, played croquet, and played ball, and things like that.

Mr. Collins: Your witness.

Cross-Examination by Mr. Lytle.

Q. Mrs. Pence, you say your husband was never sick, had never been sick from February, 1920, until he died; is that correct?

A. I said only for the occasional colds, that I wouldn't call sickness.

Q. Occasional colds. And how often would he be laid up with occasional colds?

A. That I couldn't say. The hospital records would show.

Q. No, I mean at home.

A. Pardon?

Q. What period, on an average, would he be home with colds?

A. Well, maybe during the winter months he would have two or three colds, and maybe during the summer he wouldn't have any.

Q. Well, how long would he be home on each occasion; how much time?

A. I don't think he had hardly any time off; the record would show that.

Q. Well, I would like to know the approximate time.

A. Well, I couldn't hardly say when he was home with a cold.

Q. Well, I mean, was he ever home for a day?

A. Yes. He was home just before he died, for either two or three days.

Q. With a cold?

A. Yes, with a cold.

Q. And would he be home for a half a day sometimes?

A. No, I don't remember him ever being home for a half a day.

Q. Would you know whether he was home for a half a day on May 23, 1932?

52 A. He might have been; I don't know.

Q. You wouldn't say he wasn't?

A. No, I wouldn't say he wasn't.

Q. Would you know whether he was home a half day on February 18, 1932?

A. (No answer.)

Q. You wouldn't remember?

A. I wouldn't.

Q. You wouldn't say he wasn't home?

A. No. I would remember any length of time he was home.

Q. Now, do you remember him being home for three days?

Mr. Collins: What year?

Mr. Lytle: August 12, 1932, three days prior to August 12, 1932; to be exact, from July 23 to July 25, 1932.

A. No, I don't.

Q. He might have been home?

A. He might have.

Q. And he might have been home for a day and a half in October, 1932?

A. He might have been.

Q. And he might have been for two and one-half days in November, 1932?

53 A. It is possible.

Q. And he might have been home for a half a day in December, 1932, the 24th?

A. He might have been.

Q. And he might have been home for two days, January 26th, January 27th, 1933?

A. If I may add, you know they have some days' sick leave from the hospital.

Q. No, just answer my questions.

A. Yes.

Q. Might he have been home those days?

A. He might have.

Mr. Collins: Pardon me just a minute. I think the other part of the plaintiff's answer is material, and she should be allowed to make it.

The Court: Well, you can question her on the redirect examination.

Mr. Lytle:

Q. Did he suffer with duodenal ulcer in 1932?

A. No, he did not to my knowledge.

Q. Would you know everything he suffered with, Mrs. Pence?

A. Well, I think I would, if it was of very much account.

54 Q. You are familiar with your husband's signature?

A. Sure.

Q. I hand you Defendant's Exhibit, for identification, "A", and ask you if that is your husband's signature?

A. Yes.

Q. Is that his handwriting?

A. It looks like it.

Q. And will you read to the jury what is said?—I will.

"I hereby certify I have the honor to request an extension of leave of absence on account of sickness for two days. I hereby certify that I was sick from January 26, 1933 to January 27, 1933, inclusive; that I was unable to attend to my official duties during said period, and I find that I was not attended while sick. Nature: Sinusitis frontal, acute, and bleeding duodenal ulcer."

Is that right?

A. No.

Q. Is that what it says?

A. That is what it says.

Q. Is that his handwriting?

A. That is his writing.

Q. I disclaim the remainder as not responsive to the question. In other words, you dispute your husband's statement. Might he have been home for three days from February 27th to March 1, 1933?

A. Well, won't your government records show that?

Q. Will you please just answer the question, please?

A. I don't remember that date, that long ago, two or three days. It might have been.

Q. He might have been?

A. He might have been home if you have got the records of it.

Q. And he might have been home for a half a day in September '33, for frontal sinusitis trouble on account of sickness?

Mr. Collins: Wait a minute. If the court please, I object to that for this reason: His being home in 1932, or any time after the reinstatement of this policy and the date of his death, is immaterial here.

The Court: Well, you are the one that brought it in the testimony as to what his health was down to the date of his death. I suppose that counsel for the government has the right to go into that.

Mr. Collins: If it is for the purpose of impeachment, all right.

Mr. Lytle: It is for the purpose of impeachment, your honor.

56 Q. And could he have been home for six days in September, 1933, for acute catarrhal fever and sinusitis acute?

A. He might have been home for a cold. I never recall any fever. If you have a fever—

Mr. Lytle: I move the latter part be stricken.

The Court: It may stand.

Mr. Lytle:

Q. I ask you if that is your husband's signature?

A. This is.

Q. And is that his handwriting?

A. It is.

Q. "Acute catarrhal fever and sinusitis acute," is that his handwriting?

A. When was that?

Q. Is that his handwriting?

A. Yes.

Q. September, 1933?

A. Yes.

Q. Did he ever have any trouble such as neuritis in his shoulder?

A. Not that I know about.

Q. He might have been home for one day in January, 1934, and you not remember it; might he not?

57 A. No, I would remember it at the time, but what I mean, I wouldn't, maybe, just recall one day at this time.

Q. You say he was home for a few days before he died, with a cold?

A. Yes, he was.

Q. What day did he die?

A. The 21st of September.

Q. 1934?

A. 1934.

Q. Was he home from the 17th to the 18th—he died on what date?

A. 21st.

Q. The 21st. Was he home on the 17th and 18th of that month?

A. I rather think that was the days he was home.

Q. And what was he suffering with?

A. A cold.

Q. A cold?

A. Yes.

Q. It couldn't be sinusitis, frontal sinusitis?

A. Well, I think any time that you would have a cold you would have a little—it would come from your sinuses, but I wouldn't know.

Mr. Lytle: I move to have that stricken.

The Court: No, I think you called for that, the
58 way you called for it.

Mr. Lytle:

Q. I hand you Defendant's Exhibit, for identification, "C", Mrs. Pence, and ask you if that is your husband's signature?

A. Yes.

Q. His handwriting?

A. Yes.

Q. Did your husband suffer sinusitis from 1920 on, continually, up until 19—

A. (Interposing.) No.

Q. He never had sinusitis?

A. I am not a doctor, you told me a while ago.

Q. Well, your husband was a doctor, an eye, ear, nose and throat specialist?

A. Yes, he was.

Q. Now, did he ever tell you that he suffered from trouble in his nose?

A. No, he said—I knew he had occasional colds, and he complained of colds.

Q. Did he ever tell you he had sinusitis?

A. No.

Q. Did he ever tell you he had ethmoiditis?

59 A. No.

Q. Myocarditis?

A. No.

Q. Did he ever tell you he had any diseases of the heart at all?

A. No. I didn't have any idea he had anything the matter with his heart because he was so active. I couldn't think he had anything wrong with his heart.

Q. Mrs. Pence, I hand you Defendant's Exhibit, for identification "D", and ask you if your husband's signature appears thereon?

A. Yes.

The Court: Would you identify that some way by date so that I can keep these records straight?

Mr. Lytle: Yes. Application for compensation, dated August 27, 1928?

Q. I hand you Defendant's Exhibit, for identification, "E", application for officer's retirement pay, purported to be signed by Lawrence W. Pence, May 24, 1929, and ask you if that is your husband's signature?

A. That is.

Q. That is?

A. That is.

Q. I hand you Defendant's Exhibit, for identification, "F", application of veteran for disability allowance under Section 200 of World War Veterans' Act.

The Court: The date, please.

Mr. Lytle: Dated July 14, 1930.

Q. And I ask you if your husband's signature appears on that?

A. Yes.

Q. I hand you Defendant's Exhibit, for identification, "G", application for pension, purported to have been executed by Lawrence W. Pence, December 8, 1933?

A. That is.

Q. I hand you exhibit for identification, "H", application for conversion of United States—to the United States Government, life insurance dated June 21, 1927, and ask you if your husband's signature appears on that?

A. That is right.

Q. I hand you Defendant's Exhibit, for identification "I", application for United States Government life insurance, dated June 29, 1932, and ask you if your husband's signature appears on that?

A. Yes.

Q. I hand you Defendant's Exhibit, for identification, "J", entitled "Claim and Statement," dated September 7, 1928, and ask you if your husband's signature appears thereon?

A. It does.

Q. I hand you Defendant's Exhibit, for identification, "K", entitled "Medical and Industrial History Statement," dated October 10, 1928, and ask you if your husband's signature appears thereon?

A. That is right.

Q. I hand you a paper dated—I hand you Defendant's Exhibit, for identification, "L", which is a letter on the

Veterans Administration Bureau of National Homes, Northern Home letterhead, Wisconsin, which is undated but bears the Veterans Administration receipt stamp dated November 28, 1931, at Milwaukee, Wisconsin, and ask you if your husband's signature appears thereon?

A. Yes.

Q. Are the three pages in his handwriting?

A. Yes.

Q. It is?

A. Yes.

Q. I hand you Defendant's Exhibit, for identification, "M", dated December 8, 1933, and ask you if your husband's signature appears thereon?

62 A. That is right.

Q. Mrs. Pence, you don't know whether your husband ever consulted any other doctors pertaining to his nose condition, do you?

A. I don't think he did.

Q. I ask you, do you know whether or not he did?

A. No, I wouldn't know, but I never heard of it.

Mr. Lytle: That is all.

Redirect Examination by Mr. Collins.

Q. Were you and your husband pretty close to one another?

A. Yes.

Q. If anything very seriously was the matter with him, were your relations such that he would communicate it to you?

A. Yes, I think I would have known it.

Q. Did he ever communicate the fact to you that he consulted any physician?

A. No.

Q. Do you know how he got colds?

A. Well, he worked in the eye, ear, nose and throat clinic, and worked over men that had colds and had to have their throats treated, all the time, and, naturally, he would pick it up every little while. When you are
63 around a person, when you are treating them, they cough in your face and they have colds. I often heard him—maybe I can't say that.

The Court: Not that.

Mr. Collins:

Q. Do you know whether doctors at the home were allowed a sick leave of a certain number of days a year?

Mr. Lytle: I object. The witness is not qualified to say about what the other doctors were allowed.

The Court: Objection overruled. The witness may answer.

A. I don't know just how many it was, whether it was 15 days or 10 days; but in the year they had so much vacation and so much sick leave.

Mr. Collins:

Q. Did Dr. Pence take all his sick leave, if you know?

A. I don't believe he ever did.

Q. In these various exhibits that counsel showed you, that were taken from Dr. Pence, will you state whether or not Dr. Pence ever had anything but a cold?

Mr. Lytle: I object to the question.

Mr. Collins: Q. Apparent,

Mr. Lytle: The witness testified he had nothing but
64 colds.

The Court: Yes, I think the question has been gone over. As far as this witness knows it is nothing but colds. Objection sustained.

Mr. Collins:

Q. Counsel asked you something about duodenal ulcer. Did Dr. Pence, from what you know of him, appear to have a duodenal ulcer?

Mr. Lytle: If your honor please, I think that comes within the same category as the last objection.

The Court: Objection sustained.

Mr. Collins:

Q. Did you ever know of Dr. Pence being confined, or being unable to do his work, or complaining of anything like a duodenal ulcer?

A. No.

Q. Do you know of Dr. Pence's ever having consulted about a duodenal ulcer?

A. No.

Q. Did Dr. Pence, while he was in the service at Sioux Falls, have made what is known as a G. I. at the hospital there?

A. He did.

65 Q. Will you tell what motivated Dr. Pence to have that G. I. made? That is a gastro-intestinal.

A. Gastro-intestinal.

Q. What, in his family history, moved him to have that done?

Mr. Lytle: I suppose the form of the question is bad, your honor.

The Court: Well, the witness may answer.

A. Well, his mother died of cancer, and when he went in the Veterans Hospital he was at a place and had a chance where he could have a check-up, and I know he said he had a check-up there, but I didn't think they found anything.

The Court: Never mind what they found.

Mr. Lytle: I move it be stricken.

The Court: The rest of the answer will be stricken.

Mr. Collins:

Q. He had a check-up?

A. Yes.

Q. Did Dr. Pence go down to the Hines Hospital sometime a year or two before he died, for an application he had made for a general examination?

A. Yes.

Q. Did Dr. Pence go out to Waukesha any time 66 after 1930 for a general examination?

A. I don't remember about that, but I think he did; but I am not just positive.

Q. Were these examinations made in connection with these various applications that have been introduced?

A. I remember—

Mr. Lytle: I object.

The Court: Objection sustained.

Mr. Collins: That is all, Mrs. Pence.

The Court: That is all.

(Witness excused.)

JOHN ROBERT PENCE, called as a witness herein, on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Collins.

Q. Your full name is?

A. John Robert Pence.

Q. They call you Robert?

A. Yes.

Q. You are the son of Lawrence W. Pence, deceased, and Harriet V. Pence?

67 A. I am.

Q. And how old are you, Robert?

A. 26.

Q. Were you ever in the navy?

A. Yes, sir; December 11, 1933, I was sworn in.

Q. And you have been discharged from the navy?

A. Honorably discharged.

Q. And up to the time you joined the navy in December, '33, state whether or not you lived with your parents.

A. I had never been away from home.

Q. In 1927, where did you live?

A. Repeat that, please.

Q. From June 1 down to the date of your father's death, where did you live, to the time of the death?

A. Well, we lived in Milwaukee, and I lived with my parents up until the time I enlisted in the navy, December, 1933.

Q. Well, then, you lived with your parents out at the home?

A. That is right.

Q. Attended school here?

A. Yes, sir.

Q. Do you know Mr. Warner?

A. Yes, sir.

68 Q. Where did you meet him?

A. He was a history teacher, my American history teacher at West Division.

Q. Is he still at West Division High School?

A. Yes, sir.

Q. Now, between June 1, 1927, when your family moved to Milwaukee, and the time of your father's death, do you

know of any apparent illness that your father had except the occasional cold?

A. No, sir.

Q. You were born in 1914, were you not?

A. 1913.

Q. 1913. What date?

A. July 10th.

Q. July 10th. And you will be 27 this next July?

A. Yes, sir.

Q. Do you remember any work that your father did at State Center or at Fertile; can you remember those places?

A. Oh, yes.

Q. Well, what memory have you of your father's work?

A. Well, especially in Fertile where he had a big garden, and outside of his private practice where he used to go fishing all the time.

69 Q. After his discharge from the army he practiced first at State Center?

A. State Center.

Q. A few years then at Fertile?

A. At Fertile.

Q. And then back at State Center?

A. State Center.

Q. Were you with him and your mother when you went to Sioux Falls in March of 1925?

A. Yes.

Q. Did your father have any apparent sickness that you recall during the time you were at Fertile or at State Center?

A. Not at all.

Q. Did your father have any apparent sickness when you were at home with him in Sioux Falls, South Dakota, between March 1, 1925 and January 1, 1926?

A. No, sir.

Q. Do you ever recall of any other doctor or any doctor being called in to your father's and mother's home to attend your father?

A. No, sir.

Q. What kind of a practice did your father have at 70 Fertile, if you know?

A. You mean—

Mr. Lytle: I think that the fact that this boy was ten years old and to ask him what kind of a practice he had—

The Court: I don't think it is very material, but if you

remember anything about it, whether he went around the country a good deal, or what.

A. Very well. I used to drive with my dad in the winter time. I used to go with him always when we used the teams and cutter and sled. I used to ride with him. He used to bundle me up and take me with him.

The Court: The answer may stand.

Mr. Collins:

Q. You didn't go with your father down from Sioux Falls, down to Fort Thomas, Kentucky?

A. No, sir.

Q. Was your father transferred from Fort Thomas to Milwaukee about April of 1926?

A. He was.

Q. Do you know of any apparent illness that your father had from the time that he came to Milwaukee April 1, 1926, to August 1, 1926, when he was stationed at Milwaukee?

71 A. No, sir, I do not.

Q. Do you recall any doctor ever coming over to the home to attend your father?

A. I do not.

Q. You went with your father and mother from Milwaukee to Leavenworth, Western, Kansas, about August 1, 1926, did you not?

A. Yes, sir.

Q. And you stayed with your father and mother while they were down at Fort Leavenworth, Kansas?

A. Yes, sir.

Q. Do you know of any apparent illness, or any illness apparent to you, that your father had while he was at Leavenworth, Kansas?

A. The most he ever had was a cold as long as I ever knew.

Q. Your father and mother moved from Fort Leavenworth, Kansas, to Milwaukee, did they not, about June 1, 1927?

A. Yes, sir.

Q. And you came with them?

A. I did.

Q. Now, from June 1, 1927, on, for a month or so, for one month, July 1, 1927, do you recall any apparent illness that your father had?

A. I do not.

72 Q. What work did your father do in Milwaukee?

A. Physician at the Soldiers Home.

Q. What physical work did he do?

A. Well, we played golf and he cut the grass out there and went fishing. We played golf pretty near every afternoon during the summer months.

Q. From the time you first knew him at State Center, the beginning of January, 1920, down to July 1, 1927, when the policy was reinstated, what was the apparent state of his health?

A. Excellent.

Q. Were you living at home on September 21, when your father died?

A. No, sir.

Q. In 1934?

A. No; sir.

Q. Where were you then?

A. Tres Marias, California.

Q. You went in the navy in—

A. (Interposing.) 1933, December.

Q. You have a half-brother, have you not, Mr. Pence?

A. Yes, sir.

Q. What is his name?

A. Lawrence Waldo.

73 Q. Lawrence Waldo Pence?

A. Junior; yes, sir.

Q. He lives in this city, does he not?

A. He does.

Q. Is he older than you or younger?

A. He is older than I am.

Mr. Collins: That is all. Take the witness.

74

Cross-Examination by Mr. Lytle.

Q. Mr. Pence, you went in the Navy December 11th, 1933?

A. Yes, sir.

Q. When were you discharged?

A. I think December the tenth, 1937.

Q. December, 1937?

A. Yes, sir. I wouldn't remember the exact dates on it.

Q. Well, it was in December of '37?

A. Yes, sir.

Q. During that time where were you stationed?

A. Well, I was in and out of San Diego. I was on destroyer service.

Q. Altogether how much time—did you ever come home for a visit during that time?

A. I did.

Q. How much time altogether were you home during those three years?

A. Well, I was home once for—I came home after my first three months' training, I think, for ten days' leave—"boot leave" they called it, and then I was sick at home and I had to stay home a little longer. I believe I stayed home thirty days altogether.

Q. Altogether?

A. And then I came home once on a twenty day
75 leave at Christmas time. I believe it was in 1936.

Q. So you don't know what your father's health was from December 30th, 1933 on up until the time he died, according to your own observations, except during the period you were home; is that right?

A. Yes, sir.

Q. And from December '33 to September '34, when he died, how much time would you say you were home?

A. I was home on "boot leave" pretty near thirty days.

Q. When was that about?

A. In March.

Q. Of what year?

A. '34.

Q. Of '34. You were home thirty days.

A. Yes.

Q. So from December '33 to September '34 you only had thirty days to observe him?

A. That is right.

Q. And you don't know what his condition was while you were away, do you?

A. I know he wasn't sick or I would certainly have been notified of that.

76 Mr. Lytle: I move that be stricken. I don't think that is competent.

The Court: Well, the answer may stand in view of the form of the question. It is not very conclusive.

Mr. Lytle:

Q. You were born in 1913?

A. Yes, sir.

Q. What date?

A. July the tenth.

Q. July tenth. And you say from January, 1920, to July, 1927, your father's health was excellent, I think you testified?

A. Yes, sir.

Q. Now, in January, 1920, how old were you?

A. I must have been seven years old?

Q. Seven years old?

A. Uh-huh.

Q. And 1927 you were fourteen, weren't you?

A. That is right.

Q. Do you distinctly remember everything that happened during that time?

A. No, I don't think I can remember everything that happened in that length of time unless I kept a diary.

77 Q. Do you remember when you were seven what your father's health was?

A. Yes. It was very good. I used to go with him.

Q. Do you remember everything your father complained of, any headaches or sinusitis trouble?

A. I do no.

Q. He never complained of headaches?

A. Not to me.

Q. Never complained of sinus trouble?

A. Not to me.

Q. You never heard him mention it to anybody else?

A. I did not.

Q. What year were you at Sioux Falls?

A. I guess we went there in '26 or '25.

Q. '25, weren't you?

A. '25.

Q. At that time you were twelve years old?

A. Yes, sir.

Q. And you say you drove a car?

A. My father drove a car; I didn't.

Q. What did you do?

A. I say I used to go along with him.

78 Q. Where did you go with him?

A. I never made mention of Sioux Falls where I went with him. That was in Iowa when he was in private practice.

Q. Oh, in Iowa?

A. That is right.

Q. You went with him then?

A. Yes, sir.

Q. You were twelve?

A. Yes, sir.

Q. And you never heard him complain of headaches or sinus trouble?

A. No, never did.

Q. You were fourteen years old when you were at Leavenworth, weren't you?

A. Well, I really would have to stop and figure it up.

The Court: It is a matter of mathematical computation. Let us not waste any time on that.

Mr. Lytle:

Q. Did you take out any government insurance while you were in the Navy?

A. I have since—

Q. You have taken it out?

A. Yes, sir, I have insurance with the government.

79 The Court: That is all. Next witness.

(Witness excused.)

LAWRENCE WALDO PENCE, called as a witness herein on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Collins.

Q. What is your full name?

A. Lawrence Waldo Pence.

Q. How old are you, Mr. Pence?

A. Thirty-eight.

Q. Were you living with your father and mother—strike that.

(Question waived.)

Q. Your mother died, did she not?

A. When I was about two years old.

Q. Yes. And your mother's sister, Harriet Pence, married your father?

A. That is right.

Q. She brought you up?

A. That is right.

Q. Lawrence, do you remember when Lawrence W. Pence, your father, entered the United States service
80 at Camp Dodge, Iowa?

A. Well, I think it was about 1917.

Q. It might have been 1918?

A. It might have been.

Mr. Lytle: That was stipulated, your honor.

The Court: He entered the service August 7, 1918. It is so stipulated.

Mr. Collins:

Q. And after your father left the government service, he went to practice where, Mr. Pence?

A. I believe he came back to State Center, the place that he was when he enlisted.

Q. That is in Iowa?

A. Yes.

Q. And about how long did he practice there?

A. About two years, I believe.

Q. After leaving State Center, Iowa, and the general practice, where did he go?

A. He went to Fertile, Iowa.

Q. Then before he went into government service where did he practice immediately before that?

A. Well, from Fertile he went back to State Center.

81 Q. Do you remember he went into the government service sometime in 1925?

A. I believe it was about that time.

Q. Around March 1st, 1925, wasn't it?

A. I wouldn't remember the exact date.

Q. Now, after January 9, 1920, while your father was practicing yet at State Center, Iowa, do you know of any apparent illness that your father had at that time?

A. No, I don't.

Q. Were you at home with him and your mother at that time?

A. What date was that again?

Q. Were you at home with him and your mother at that time?

A. 1920?

Q. Yes, January 9, 1920.

A. I was going to high school about fifteen miles from State Center and living away from home.

Q. Where was the high school located?

A. In Marshalltown. That was about fifteen miles from State Center.

Q. And did you stay there all the time or weekends at home?

A. Weekends I usually was at home.

Q. Did you see much of your father during the time
82 that you were in high school at Marshalltown?

A. Oh, yes, I saw him a lot.

Q. How far is Marshalltown from State Center?

A. Fifteen miles.

Q. How far is Marshalltown from Fertile?

A. Well, that is about 115 miles or 110.

Q. Do you know of any apparent illness your father had while he was practicing medicine at Fertile, Iowa?

A. No.

Q. Did you go with your parents to Sioux Falls, South Dakota when your father resumed his work in the government service?

A. I didn't go with him. I was in school at that time. I visited them in the summer, the year that they were there.

Q. Did you come home at any intervals during the year?

A. Christmas vacation.

Q. You saw your father occasionally during that time you were at college?

A. Yes.

Q. What years were you at college and what college were you at?

A. I was at Iowa State College from 1921 until 1926, at Ames, Iowa.

Q. And your father left Sioux Falls before 1926 to
83 go to Fort Thomas, Kentucky?

A. Yes, he was gone before I was through school, I remember.

Q. When your father came back to Milwaukee at the National Home here, about April 1st, 1926, did you come to live with the family?

A. Not immediately. I was working in Chicago for about six, seven months. I came about the first of August.

Mr. Lytle: What year?

Mr. Collins: } '26.

The Court: } '26.

A. '27. That was the year, '27.

Mr. Collins:

Q. Oh, Well, I am talking now—let's get back to this—I am talking now about the first time your father was stationed at Milwaukee, in April, 1926 to August 1st, 1926, before he went to Leavenworth, Kansas.

A. No, I didn't visit Milwaukee at that time.

Q. You weren't in Milwaukee?

A. No.

Q. When your father and mother went down to Leavenworth, Kansas in August, 1926, did you go down there to live with them?

A. Yes, I went down about—sometime in September. I finished school in the summertime and I was down there until the following February.

A. Well, I think it was about 1917.

Q. And how long did you stay down there at Leavenworth, Kansas, with your family?

A. About five or six months.

Q. Were you with them when they came back to Milwaukee on June 1st, 1927?

A. No. I was working in Chicago at that time.

Q. How much of that period down at Leavenworth, Kansas did you live at home with your father?

A. All of the time.

Q. What?

A. All of the time.

Q. Well, they were in Leavenworth, Kansas from August, 1926 to June 1st, 1927. Were you there all of that time with your father?

The Court: You just answered that you were there until February.

A. That is right.

Q. So it wasn't all of the time, was it?

A. No.

Mr. Collins:

85 Q. Part-time?

A. Yes.

Q. What was the apparent state of your father's health while you were down at Leavenworth from such times as you were there when he was stationed there?

A. It seemed to be good.

Q. Did you ever hear your father complain of pains in the head or sinusitis?

A. No, I didn't.

Q. Do you ever recall that your father had any apparent sickness while he was at Leavenworth?

A. I don't recall any.

Q. When he went to Milwaukee, beginning in June,

1927, just tell us after that date up to July first, whether or not you were there with your parents in Milwaukee?

A. From June, 1927—

Q. To July 1st, 1927.

A. No, I was not there except on a visit. I was working in Chicago and visited them a couple of times.

Q. Did you at any time after June 21, 1927, visit your father's home here at National Home in Milwaukee up to the time he died?

86 A. I came from Chicago in about the last of August, 1927, and I remained at the home until the time of his death continuously, except for a few months.

Q. Yes. And then from August, 1927 to September 21, 1934, you were at home with your father and mother?

A. That is right.

Q. At the National Home, is that right?

A. That is right.

Q. What was the apparent state of your father's health during that particular period that I have just designated?

A. It was good at that time, too.

Q. Was your father ever home with colds during that period?

A. I think he was on some occasions.

Q. To your knowledge, was he ever confined to bed in any of that period?

A. Never was in bed, as far as I know.

Q. Did you ever see any doctor come over to treat your father during that period?

A. No.

Q. During the period from the time that the policy lapsed about February 1st, 1920, down to June 21, 1927, at the different places that your father was, do you
87 recall of any doctor that came to the home to treat your father?

A. No, I don't.

Q. What kind of a build did your father have?

A. I beg your pardon?

Q. What kind of a man was your father, his height, weight and so on?

A. He was of medium height and he was rather stocky, heavily built.

Q. Weighed about what?

A. About 170, I would say; 160 to 170.

Q. Did your father take any physical exercise while he

was out here at the home beginning June 1st, 1927, up to the date of his death, in September, 1934?

A. He played golf, he hunted, fished and he got a lot of exercise on the lawn mower.

Q. Did anyone other than your father cut that lawn out there at the home while you were there?

A. I don't recall anyone else ever doing it. He didn't want anyone else to do it.

Q. Were there any other outside activities or outdoor things that he loved and followed?

A. Oh, he liked fishing and hunting quite well. He used to like to play golf and baseball.

Q. Did you ever go hunting or fishing with him?

A. I have been fishing with him quite a few times, not hunting.

Mr. Lytle:

Q. Not hunting?

A. No hunting.

Mr. Collins:

Q. I don't know whether I asked you whether your father had any outside activity at Fertile and State Center?

A. He had a very large garden at each place and he used to like to work in that whenever he could spare any time from the office, and he managed to find quite a little time.

Q. What time did he go to work at State Center?

A. He used to get up quite early. He used to get up at five o'clock in the morning and work until someone called him at the office, most of the time.

Mr. Collins: That is all. Take the witness.

Cross-Examination by Mr. Lytle.

Q. Do you know whether your father ever consulted a physician from 1920 up until the date of his death for his health?

A. Not that I recall.

89 Q. You remember him in State Center, don't you?

A. Yes.

Q. In 1919, 1920?

A. Yes.

Q. Do you know Dr. J. D. Kaufman?

A. I know him.

Q. Do you know whether your father consulted him for sinusitis?

A. Not that I know of.

Q. Do you remember Marshalltown, Iowa, in 1919?

A. Yes, I do.

Q. Do you know whether your father consulted Dr. R. H. French of Marshalltown for treatment of sinusitis frontal?

A. Not that I know of.

Mr. Collins: I object to that as immaterial.

The Court: Objection overruled.

Mr. Collins: Object to it as not proper cross-examination.

The Court: Objection overruled.

Mr. Lytle:

Q. Do you know whether your father consulted Dr. Burke in Mason City, Iowa, in 1922 and 1923?

A. I never heard of him.

90 Q. For sinusitis, you don't know of it?

A. No.

The Court: He said he never heard of it.

Mr. Lytle:

Q. Do you remember of Dr. Glickman of the Veteran's Administration treating your father in 1926 or '27?

A. Not that I know of.

The Court: We will recess until 3:30, a fifteen-minute recess. Those here will stay in their places until the jury leaves.

Of course, I have given the jury instructions in other cases. It need not, perhaps, be repeated, but I will say to you again that you, of course, understand the part of your duty that not only should you not talk to anyone about this case until it has been submitted to you nor permit anybody to talk to you about it or even talk about it amongst yourselves. If anybody should persist in trying to talk to you about this case, you will, of course, report that promptly to the court.

You may retire now.

(Whereupon a short recess was taken.)

91

After Recess.

LAWRENCE WALDO PENCE, resumed the stand, was examined and testified further as follows:

Redirect Examination by Mr. Collins.

Q. Mr. Pence, do you know whether or not as a result of these various applications made for retirement and disability compensation your father was ever retired or granted any disability compensation which was affirmed by the highest authority in the Veterans' Bureau?

Mr. Lytle: Object, your honor.

The Court: Objection sustained.

Mr. Collins:

Q. I show you Plaintiff's Exhibit No. 3, which is an application for a reinstatement and ask you if you recognize the signature of Lawrence W. Pence as that of your father?

A. Yes, that is his signature.

Q. And over to the right, or right under his signature, "Examination of L. W. Pence, made and signed this 25th day of June, 1927, Joseph H. Plant, National Home, Wisconsin," is that on this exhibit?

A. Yes, it is.

Q. Who was Joseph H. Plant, if you know?

92 A. He was another physicial at the Soldiers' Home in Milwaukee.

Q. And under Question 21: "Do you recommend acceptance of the risk: first class risk? Yes." Is that there?

A. Yes.

Mr. Lytle: I believe the document speaks for itself. It is in evidence. I don't see where it is material that this witness may testify as to whether these answers are there or not.

The Court: Well, the answer may stand.

Mr. Collins:

Q. And right after that is "Fair risk", and that is left blank?

A. Yes.

Q. And "Poor risk" and that is left blank?

A. Yes.

Q: I shall ask you for the application for the new policy which was made about June, 1932, Mr. Lytle.

The Court: If you are going to refer to a document, mark it now or identify it, and then we can have it.

(Document produced.)

Mr. Collins: I ask that this application for United States Government Life Insurance, dated the 29th day of June, 1932, and signed by Lawrence Waldo Pence, be marked for identification as a plaintiff's exhibit.

93 (Document referred to marked as Plaintiff's Exhibit No. 4.)

Mr. Lytle: That was marked for identification. I have that marked for identification. You can mark it with your mark or you can use my mark.

The Court: That is the same as what?

Mr. Collins: The same as "I." Reading from Plaintiff's Exhibit No. 1, which is the original insurance policy granted to Lawrence W. Pence under date of August 3, 1927, this policy takes effect on the 1st day of July, 1927. Reading from the first paragraph beginning in the body of the policy: "This insurance is granted in consideration of and subject to the terms and conditions hereinafter set forth and in further consideration of the payment of the monthly premium of \$13.50 on the first day of each month for a period of sixty months and thereafter monthly premiums of \$40.10 on the first day of each succeeding month and during the lifetime of the insured except as hereinafter provided. Receipt of the first premium is hereby acknowledged."

Now, reading from Plaintiff's Exhibit No. 2, which is the government's life insurance certificate of renewal, five-year level premium term insurance, signed by Frank
94 T. Heinz. "The insurance hereby renewed is subject to the conditions, benefits and privileges contained in the policy except that the nonforfeiture provisions (5) and the table of guaranteed surrender of values (6) on the second page of the policy shall be null and void from and after the date of this certificate. This insurance ceases on the 30th day of June, 1937 and no further premium will be payable unless the insurance has been exchanged for some other plan of insurance before that date. Effective as of the 1st of July, 1932."

Plaintiff's Exhibit 4 is an application for the United States Government Life Insurance dated at Milwaukee,

Wisconsin on the 29th day of June, 1932, signed by Lawrence Waldo Pence.

Q. Mr. Pence, did your father, Lawrence W. Pence, now deceased, suffer, to your knowledge, from any apparent trouble from duodenal ulcer?

Mr. Lytle: Object, if your honor please, as to the nature of any disease unless he testifies that his father told him that is what he suffered with. I have no objection to that.

The Court: Objection overruled. He may answer.

A. Not that he ever told me.

95 Mr. Collins:

Q. Did you eat at the table with him when you were at home?

A. Yes.

Q. State what his habit was with reference to food? Was he picky about his eating or would he eat anything that came along?

A. No, he ate anything that the rest of us did, just as much.

Q. How about garden vegetables? Would he eat cucumbers and beets and lettuce?

A. He ate all of those things, I believe.

Q. He never had any special meals or diet, did he?

A. No.

Q. Whenever you ate at home, and that was quite frequent, ate at home with the family, did you ever see your mother prepare anything different for your father at any time than the rest of the family had?

A. No.

Mr. Collins: I believe that is all, Mr. Pence.

Mr. Lytle: That is all.

(Witness excused.)

Mr. Collins: Mr. Warner.

G. WILLIAM WARNER, called as a witness herein on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

96

Direct Examination by Mr. Collins.

Q. Your full name, please?

A. G. William Warner.

Q. What is your business, Mr. Warner?

A. High school teacher.

Q. What high school?

A. West Division.

Q. Milwaukee, Wisconsin?

A. Yes, sir.

Q. How long have you been employed as a teacher at West Division High School in Milwaukee?

A. This is my eleventh year.

Q. You began in 1929 there?

A. Yes, sir.

Q. Do you know the Pence family, Harriet Pence and her sons?

A. Yes, sir.

Q. Did you know Lawrence W. Pence, now deceased, in his lifetime?

A. Yes, sir.

Q. Did Robert Pence ever go to school with you?

A. Yes, sir.

Q. What school?

97 A. West Division High School.

Q. What years, about, did he go there?

A. September, 1930, to February, 1933.

Q. When did you become acquainted with Lawrence W. Pence?

A. The first semester, and that would be around October of 1930.

Q. Tell us how well you knew them and how often you visited their homes?

A. I knew Dr. Pence quite well. I visited his home on the average of at least twice a week. At several times I was out with him for weekends on fishing trips and hunting trips. One time I stayed at his home for practically two weeks and I was intimately acquainted with him from 1930 until his death.

Q. During the period that you knew him, from 1930 to the time of his death, September 21, 1934, state whether or not you ever knew of his being sick?

A. No, I don't believe he was.

Q. Did you ever know of his having any colds, staying home on that account?

A. Yes, sir; slight colds.

Q. What kind of a man was he, his build and his habits?

A. Well, he was under medium height and quite stocky.

As far as his habits were concerned, they were sound
98 and very good, and he loved outside sports. Many a time we went together and played golf together, played ball together, played horseshoe together and row boat exercise is good exercise, and twice, on two occasions, we rowed the flowage of the Eau Claire up at Hayward. Anybody that knows that knows that that is something. We took our turns rowing. He and I were in the boat together.

Q. What year was that?

A. The first year I think was 1932.

Q. What about any home work that he did?

A. Well, in the afternoons when I would go over there during the summer months, he would be cutting his lawn, playing horse-shoe, or playing croquet and things like that. He was always active.

Q. At any time you knew him, from 1930, September, 1930, to the date of his death, September 21, 1934, did he appear to you to be a man that was suffering from any heart ailment?

Mr. Lytle: I object to the question, if your honor please. This witness isn't competent to testify as to whether a man has suffered from a heart ailment. A heart ailment may not even be apparent to doctors, much less laymen.

The Court: Objection sustained.

99 Mr. Collins:

Q. Was there any apparent trouble that you noticed that Dr. Pence's heart—or observations of him when he was exercising with you, playing with you, was there any complaint he made to you or did he complain of any pain or manifestations?

Mr. Lytle: Object to the form of the question.

The Court: The witness may answer just what he observed.

A. None on any occasions.

Mr. Collins:

Q. When Dr. Pence was out playing horse-shoe, how often would he play horse-shoe with you, or would you play with him in the summertime?

A. Well, I can't say offhand, but I know we played it quite often throughout the summers.

Q. Did you ever go out to the golf course with him?

A. Yes, sir.

Q. Did he play much golf?

A. Well, whenever we went we played the 18 holes. /

Q. Tell about how often in the summer that you played it?

A. As far as myself is concerned, two or three times.

Q. Did you know of your own knowledge of his going out to the golf links with anybody else?

A. Yes, sir.

Q. With whom?

A. With his son.

Q. Baseball; did you ever play that with him?

A. In the evening we played softball at the home there with him.

Q. Did he play that?

A. Yes sir.

Q. Did he run the bases and do what the younger people did?

A. Yes sir.

Q. In the hot weather in July or August, if you were there, would he cut his lawn in that hot weather?

A. Towards the evening, not at high noon, but towards evening time.

Q. Who cut most of the lawns out there for the doctors?

A. Well, I know the doctor cut his. I don't know about the other doctors.

Q. You don't know what the practice was out there?

A. No, sir.

Q. Well, did you ever see any apparant signs from your observation of Dr. Pence of what is known as sinusitis from his talks and his actions?

Mr. Lytle: Just a minute. I object to the question.

The Court: Objection sustained.

101 Mr. Collins:

Q. State whether or not, from your association with Dr. Pence, you saw any apparent signs of sinusitis?

Mr. Lytle: Object to the question for the same reason, the same question.

The Court: Objection sustained.

Mr. Collins:

Q. Did Dr. Pence ever complain to you about sinusitis?

A. No, sir.

Q. Did you ever know of any apparent nasal trouble that Dr. Pence had?

A. No, sir.

Q. When you were out with Dr. Pence, did you ever have meals together?

A. Yes, sir.

Q. Was he finicky or picky about his appetite, or would he eat what ordinary people would?

A. He ate what we all ate.

Q. Was he a hearty eater, or what was his appetite?

A. He was not a heavy eater; medium to a light eater.

Q. What was his apparent weight, do you know?

A. I judge about 160 pounds.

102 Q. Prior to the time when you had Robert at school, you did not know the Pence family?

A. About one month.

Q. One month before Robert came to school, you knew the Pence family?

A. One month that he was at school. He came in September, and I met the folks in October.

Q. Did you ever go hunting with the doctor and, if so, where?

A. We went up to Winneconne several times, the doctor and I. We went hunting and fishing. The doctor wasn't much for carrying a gun, and he liked the walk and the hiking that we did. Several times he didn't even carry a gun; he just walked along with us.

Q. On those trips did you notice him favoring himself in any way or hanging behind, or did he keep up with the rest of you?

A. He kept right up with us.

Q. Did he ever make any complaint about his heart in your presence at any time?

A. No, sir.

Q. Did you ever notice any shortness of breath on his part when he was out hunting or fishing with you?

A. No, sir.

103 Q. How would you rank him for a man of his years: Was he more active than the usual man of his years, or was he less active?

Mr. Lytle: "Object to the question; it calls for a conclusion, a comparison of the witness.

The Court: Objection sustained.

Mr. Collins:

Q. Well, how would you describe Dr. Pence as to his habits in reference to exercise in outdoor activities?

A. Well, he partook, for a man of his age, more than any other gentleman I know, except one or two, that were interested in the same sports that he was; but so far as the average man of his age, I know very few in my acquaintances that took the exercise that he did.

Q. Did baseball or horse-shoe seem to tire him?

A. No, sir. He played right along with us. When we quit he quit.

Q. He died September 21, 1934. When did you last see him prior to his death, if you recall?

A. The day before he died; that is, I guess he died on a Friday, and I saw him the Wednesday before he died. That is the last I saw him.

Q. And what, if anything, were you and he planning the last time you saw him?

104 Mr. Lytle: Object to that, what they were planning.

The Court: Objection overruled.

A. We were planning a little hunting and fishing trip for the following weekend. He had a couple of days off, and I was going up with him on Saturday and Sunday, and I was coming back because I had to go on to work, and then he was going to come back two or three days later.

Q. And just where were you planning to go, Mr. Warner?

A. We were going up to Big Carp Lake. That is near Tomahawk, the American Legion camp.

Mr. Collins: That is all. Take the witness.

Cross-Examination by Mr. Lytle.

Q. You say he didn't like to carry a gun?

A. No, sir.

Q. You don't know why he didn't like to carry a gun, do you?

A. No, I don't.

Q. You say he was a light eater, light to moderate?

A. Yes, sir.

Q. You don't know why he was a light to moderate eater, do you?

A. No, sir.

Q. He was a doctor, wasn't he?

105 A. Yes, sir.

Mr. Lytle: That is all.

The Court: Next witness.

(Witness excused.)

Mr. Lytle: If your honor please, the counsel wanted to offer the document we discussed in chambers, and I ask that it be offered here, not in the presence of the jury.

Mr. Collins: I would like to have it marked.

The Court: The bailiff will take the jury outside.

(The jury retired from the court room and the following proceedings were had out of the presence and hearing of the jury.)

(Document marked Plaintiff's Exhibit No. 5.)

The Court: You may make your offer now. The record will show that the offer is made not in the presence of the jury.

Mr. Collins: We offer in evidence PLAINTIFF'S EXHIBIT NO. 5, which is a report dated June 6, 1932, by the Administrator's Board of Appeals on the case of Lawrence W. Pence. The identifying mark is C-1,437,493, which is signed by John R. Galbraith, Rating Expert; W. E., or W. G., Cassells, Medical Adviser—

Mr. Lytle: I think it is W. E. Cassells.

106 Mr. Collins: (Continuing.) And J. W. Hayes. We offer this because counsel has seen fit to introduce various applications; I think four in number.

The Court: They haven't been introduced, just marked for identification. He has only marked them for identification and I suppose will produce them as a part of his case. If he does, then I think it would be time enough for you to offer yours. The ruling on those applications—the court will then have to pass on whether they are admissible.

Mr. Collins: Well, I understood that when he had them marked he had them admitted.

The Court: No, none of them were offered in evidence. So I suggest that if you withdraw the offer now without prejudice—

Mr. Collins: I will withdraw it. I was under the impression that you had offered them.

Mr. Lytle: Well, to save time, while the jury is out I think I can tell you right now whether I will offer them, and do away with them, and dispose of them.

The Court: All right, you may.

Mr. Lytle: If your honor please, I will introduce in evidence—but let me state for the record and your 107 honor that I am offering these exhibits, I will offer them for my case for only the statements contained therein, which constitute applications against interest, and I am only offering them as admissions against interest. If an admission against interest appears in the compensation, I am not offering that application because it is an application of compensation; I am offering it for no other reason than that it contains the man's own statement as to what disability he was suffering from, even though I have to offer a statement, an admission against interest, even though it is in an application for compensation.

I submit, your honor, that that application in which the admission is contained doesn't open the door for him to introduce any rulings on the compensation matters, but I will assure the court that I will offer in evidence EXHIBITS H, G, J, D, K, E, F, L and M, but not for anything pertaining to compensation, only for the statements contained therein which are admissions against interest as to the man's condition of health as he states it was.

Mr. Collins: It is all right if he offers that much of them. I will ask that the whole thing go in.

The Court: Well, we will wait until we get to that in the defendant's part of the case.

108 Mr. Collins: Then, I will ask counsel to produce the medical reports of the United States doctors.

Mr. Lytle: Is there a ruling on this?

The Court: No, because I am not going to rule until you have actually offered your evidence and he offers that in rebuttal to your offers, so it is done without prejudice.

Mr. Collins: I wonder if I could have that stipulation which Mr. Lytle—well, I am pretty sure that it doesn't include what I am after now. I wonder, Mr. Lytle, if you will stipulate that the government policy which was taken out on July 1, 1927 for the old policy in the clause that then existed, expired on July 1, 1932.

Mr. Lytle: No, I can't stipulate that because the policy provides, and I have the law here on which the regulations

of the administration—which provides that the policy continues as a whole life policy unless it is renewed; and it was renewed. The same policy was renewed, and I can't stipulate it expired. That form in which it was, your honor, it was a five-year convertible term—by act of Congress that term expired in five years, five-year convertible term, but the policy provides, and the law provides, that it is to continue in force as a whole life insurance if it is not continued, renewed, as a five-year convertible term policy.

The Court: Well, in this case it was renewed as a convertible policy.

Mr. Lytle: So I can't stipulate it expired.

Mr. Collins: Well, will you stipulate that this was a new policy of insurance that was issued upon the application dated the 29th day of July, 1932?

Mr. Lytle: No, I can't stipulate it is a new policy. Defendant's Exhibit 2 is an application and certificate of renewal. I can't stipulate it is a new policy.

The Court: All right. Proceed with anything else.

Mr. Collins: I would just like to have that—to cover that stipulation that was made this morning before I rest my case. I would like to see that everything essential is in that stipulation and in my proofs.

The Court: Well, I wanted to run to four-thirty, but I believe we will recess at this time and you can confer with the reporter and show what is covered in the stipulation; and then if there isn't anything more, the defense will start in with their case tomorrow at ten o'clock. If there is additional material, you have the opportunity to offer it in evidence.

I suggest that counsel get together on everything 110 that is going to come up here so that we will save time, so that we won't waste any more time.

Call back the jury.

(The jury re-enters the court room and the following proceedings were had.)

The Court: Ladies and Gentlemen of the Jury: I am going to excuse you until ten o'clock tomorrow morning. Be here promptly and be sure not to talk to anyone about this case. You will now be excused until ten o'clock tomorrow morning.

(Whereupon an adjournment was taken to Tuesday, April 16, 1940, at 10:00 o'clock A. M.)

111

Milwaukee, Wisconsin,
Tuesday, April 16, 1940,
10:00 o'clock A. M.

Court met pursuant to adjournment last above noted.

All parties present.

Mr. Collins: I call Dr. Arch B. Thompson.

DR. ARCH B. THOMPSON, called as a witness herein, on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Collins.

Q. Your full name is?

A. Arch B. Thompson.

Q. You are in charge of the National Home and the combined facilities out here at Wood, Wisconsin?

A. Of the hospital activities.

Q. Of the hospital. How long have you been in charge of that hospital?

A. Since August 15, 1926.

Q. You knew Dr. Lawrence W. Pence, did you not?

A. I did.

Q. Dr. Pence came to that hospital for the first time
112 as a doctor on or about April 1, 1926, and stayed until August 1, 1926, did he not?

A. According to the records he did. I was not there at that time. I don't know from personal knowledge.

Q. What was the date when you took charge of the hospital?

A. August the 15th, '26.

Q. Then, the following June 1, 1927, Dr. Pence was transferred from Leavenworth, Kansas, Western Home of Kansas, to the National Home here at Wood, Milwaukee County, Wisconsin, was he not?

A. That is the approximate date, as I remember.

Q. And you were in charge at the time he came there?

A. Yes, sir, I was.

Q. And as head of the hospital, what are your duties with reference to the doctors working under you?

A. I don't believe that I get the purpose of the question exactly.

Q. Well, do you observe the condition of the doctors and the efficiency or lack of efficiency in their work?

A. I do.

Mr. Lytle: I object to the question. It has no bearing on the issues involved in this case.

The Court: Objection overruled.

113 Mr. Collins:

Q. Is it your duty annually, in charge of that hospital, to have examinations, physical examinations, of your various doctors made?

A. It has been at periods. Not all the time. For a few years that was true. It is not true at the present time. It was not true at the time that Dr. Pence reported there for duty.

Q. From the time that you took charge in August, 1926, was it then the custom to have physical examinations of your doctors made?

A. It was not.

Q. Have you at any time during the period that you have been in charge had examinations made of your doctors?

A. We have, yes, sir.

Q. Have you had examinations made of Dr. Lawrence W. Pence while he was in that hospital working under you?

A. I can't answer that positively; I don't know.

Q. Annually, is it your duty to make efficiency reports to your superiors in Washington on efficiency or lack of efficiency of the doctors under you?

A. It is not. I review them, but the clinical director makes the efficiency report at the present time. At one time I did make them.

114 Q. Did you make them while Dr. Pence was there?

A. Part of the time, yes.

Q. The examinations that are made are by an assistant, or made under your direction and your charge, are they not?

A. They are; yes, sir.

Q. And you supervise those reports and examinations, do you not?

A. I couldn't say that I supervise them, no; not directly.

Q. Well, what connection would you have with them, Doctor?

A. Do you mean the physical examinations of the staff? Is that the question?

Q. Yes.

A. Nothing particular, unless it is called to my attention that there is—the man is not able to carry on.

Q. In 1928 Congress passed a law which I believe you know of, providing for retirement for disability compensation, did it not?

A. About that period; I don't remember the date.

Q. Now, prior to 1928, when Congress passed that law, did Dr. Lawrence W. Pence ever make any complaints to you about his physical condition?

Mr. Lytle: I object to that as to complaints in treatment in connection with examination. I think the court is well established on that.

115 The Court: Objection overruled.

A. Would you please state the question?

(Pending question read by the reporter.)

A. I don't recall.

Mr. Collins:

Q. After Congress passed that law in 1928, did several of your doctors apply for retirement or compensation, or disability benefits, that you know?

Mr. Lytle: I object to what other doctors did as having no bearing on the issues in this case as to what Dr. Pence did.

The Court: Well, I don't see much bearing unless you are trying to establish that there was a general practice for a certain time limit for the people to make applications for disability. Is that what you have in mind? In other words, ordinarily it wouldn't be, what some other doctors did, it wouldn't have any bearing on this case unless it was part of a practice.

Mr. Collins: Well, I want to establish the practice and the custom of the doctors right in this hospital.

The Court: Well, you may answer.

A. I have no definite knowledge that they did. That would not come through my department.

116 Mr. Collins:

Q. Did you at various times while Dr. Pence was there certify to Washington on his efficiency?

A. Yes, sir, I did.

Q. And state whether or not he was efficient.

Mr. Lytle: I object to the question as having no bearing on the issues involved. My objection goes to all these questions along this line, so I won't have to repeat the objection.

The Court: Objection overruled. This testimony along

this line is received subject to the objection of the government through its attorney.

A. I would have to answer that relatively—I would say he was efficient. We record that in different degrees of efficiency. I can't tell you from memory what his efficiency rating was. I don't know.

Mr. Collins:

Q. I show you, from this government file which I just secured from Mr. Lytle, what is designated as a graphic rating sheet signed by you, A. B. Thompson, 5-20-32, and ask you if that is your signature at the bottom of that graphic rating sheet?

A. That is; stating that I reviewed that rating.

Mr. Lytle:

117 Q. What is that?

A. I reviewed this rating.

Mr. Collins: Now, we ask that this rating sheet be marked, for identification, as a plaintiff's exhibit.

(Document referred to marked as Plaintiff's Exhibit No. 6.)

Mr. Collins:

Q. I show you this rating, this graphic rating scale, dated 5-20-32, and ask you if that reflects his efficiency for any specific period?

A. For the period ending whatever date this is, May the 20th, 1932.

The Court:

Q. For how long a period?

A. For one year.

Mr. Collins:

Q. And there are a great many questions there in the printed sheet that are marked with either blue marks or red marks in the square of the question, are there not?

A. Yes, sir.

Q. And right down here in the fourth line there is one, "Good Speed," and there is a red check there. What does that mean?

118 A. The relative speed compared with other employees in the same class. This would be good. That is not for good speed—that has reference to industry.

Q. That check has—

A. (Interposing.) Reference to industry.

Q. What is the check that you have in that square on speed, if any?

A. This check was made by the rating officer, the one in blue is made by the rating officer, and he made it as less than industrious compared with the average. I made the red mark, and I marked it up a little better than he did.

Q. Under the next heading, which is the fifth line of this graphic rating scale, there are several headings. The first one is "Greatest possible diligence."

A. That has reference to the same question.

Q. Oh, this industry?

A. That all has reference to that.

Q. Well, now the next line, which is the sixth line of this Plaintiff's Exhibit 6, on the question of his information, "Completely informed, unusually well informed, well informed, less than the average well informed, and poorly informed." Which one of those are checked here?

119 A. The rating officer checked the "less than the average well informed." The reviewing officer marked in red, which I marked—I marked it "well informed."

The Court: Well, now, just a minute, Mr. Collins. I permitted you to have considerable latitude, but, after all, we should confine ourselves in this case primarily to whether the answers that Dr. Pence made in his application of June 21, 1927, were true or false, and if they were false whether they were knowingly and intentionally false. Now, keeping that in mind, that is about the only issue that I can see in this case. I think that whether he was efficient or more than the average in '32 or '34 isn't of very great importance except in so far as it might go to the statements he made in 1927, so far as they were intentionally false and fraudulent; so I don't think now, in the kind of examination that you are conducting, seeing that all of this is subject to the objection of the government, that I can permit you to go into great detail on that.

Mr. Collins: I will cut that down.

Q. Doctor, I will ask you if the doctors at the home are entitled to a certain number of days of sick leave each year?

A. They are entitled to a certain number of days provided they are certified as being actually unable to carry on their duties. That is the only provision.

There is not a certain number of days they are allowed, but within limitations they are allowed sick leave if it is certified they are unable to carry on their duties at that period; and if it is over a certain number of days they must have the signature of another physician stating they are unable to carry on; and show why.

The Court:

Q. How many days of the month, or year, would a doctor have before it would require the signature of another doctor?

A. If he is off more than three days he must have a certificate from another doctor.

Q. Three days in what?

A. In any one period.

Q. What is the period?

A. Well, he is allowed so many days during the year. That has varied at different times. Some years it has been thirty days, depending on the regulations set forth; but if he is out more than three days he must have a certification from another physician.

Q. Three days in succession?

A. In any one period, three days in succession.

Q. I see. And they are supposed to be actually sick and not just an excuse to go on a trip or to a ball game?

A. No. They must be actually sick, and they must state on there what the sickness is.

Mr. Collins: Is it stipulated that the sick leaves that I have in my hand are the only ones that Dr. Pence had while he was in the employ of the National Home?

Mr. Lytle: No, I don't know that, your honor. All I know is that I got the personnel file, and there is the file, and all I know is that that is all there was in the file.

The Court: Well, he can't stipulate more than that, if that is all there were in the file.

Mr. Collins:

Q. I show you several cards which are entitled "Veterans Administration for Extension of Leave on Account of Sickness" and ask you if these are the usual type of cards that are made out by a doctor at the home for sick leave?

A. It is. That card has been used since sometime in '31.

Q. What was used before 1931?

A. The doctors from the Home Service had no sick leave given. It had to be taken from their annual leave.

Q. Well, I show you these and ask you to look through them, and ask you to see if they are regular sick leaves, 122 just keeping them in order.

(Witness examines documents referred to.)

The Court: What do you mean by "regular sick leaves"?

Mr. Collins: The regular forms used for sick leaves.

A. That is not a sick leave (indicating). They are regular forms.

Q. And they state on them what?

A. I didn't look.

(Documents again handed to witness by counsel.)

A. The earliest date is August the 15th, 1931.

Mr. Collins:

Q. They run from that date up to 1934, do they not?

A. I saw one in there for '34, yes, sir.

Q. Yes. And these sick leaves are signed by the doctor asking for the sick leave, are they not?

A. They are.

Q. And they specify the cause, do they not?

A. They are supposed to specify the cause and especially have to give the diagnosis, if it is over three days.

Q. In all these sick leaves as you glanced through them, see if there is any one signed by another doctor for more than three days.

A. There is one that is signed by another, signed by 123 Dr. W. W. Pretz. He was off sick six days from September 19th to September the 23rd, 1933. That is the only one I find.

Q. In running through these, the first one here is dated August 15, 1931, and is for how many days?

A. For one day.

Q. And the second one, dated August 10, 1931, is for how many days?

A. Three and one-half hours.

A. And the third one, dated February 17, 1932, is for how long a period?

A. One-half day.

Q. And the fourth one, dated July 25, 1932, is for how long a period?

A. Three days.

Q. And the fifth one, dated January 27, 1932, is for how many days?

A. Two days.

Q. And the sixth one, dated March 1, 1933, is for how long?

A. Three days.

Q. And the seventh one, dated 9-18-34, is for how many days?

A. Two days.

Q. And the eighth one, dated 5-16-34, is for how long?

124 A. One day.

Q. And the ninth one, dated 3-16-34, is for how long a time?

A. That isn't a sick leave, but it is for 45 minutes' annual leave.

Mr. Collins: We ask that these be marked for identification as one plaintiff's exhibit.

The Court: I think those can be marked as one group. It will be Plaintiff's Exhibit 7. Suppose, Mr. Reporter, when you mark them, you mark them 7-A, 7-B, and so on.

(Documents referred to marked Plaintiff's Exhibit 7-A through 7-L, inclusive.)

Mr. Collins:

Q. If a doctor is seriously sick at the home, is he hospitalized?

Mr. Lytle: If your honor please, the question is too general.

The Court: Objection sustained.

Mr. Collins:

Q. When a doctor is treated at the hospital by any other doctor, do you make a record of that?

Mr. Lytle: Same objection.

The Court: Objection overruled.

A. Not always. There is some minor thing he may have taken care of and make no record of it.

125 Mr. Collins:

Q. For any serious sickness or ailment they do make a record?

A. A serious ailment we do, yes, sir.

Mr. Collins: Have you got such record that was kept at this hospital, Mr. Lytle?

Mr. Lytle: I have presented to Mr. Collins all of the examinations that were made by the Veterans Administration, if your honor please, and I have no other records of any other records made in any other hospital.

The Court: All right.

Mr. Collins:

Q. I show you Plaintiff's Exhibit No. 3, which is an application for reinstatement, dated the 21st of June, 1927, and signed by Lawrence W. Pence, and showing on the third sheet thereof the signature of Joseph H. Plant, on the 25th of June, 1927, and ask you if Joseph H. Plant was on that date a doctor in the hospital over which you had charge?

A. He was.

Q. Is he still there?

A. He is not.

Q. Where is he now, if you know?

A. He is stationed at Albuquerque, New Mexico, 126 but where he is at the present time I don't know.

Q. And I call your attention, or first I ask you, what is the practice on applications for reinstatement of veterans' policies at the home?

A. (No answer.)

Mr. Lytle: If your honor please, I object unless there is further foundation as to qualifying this witness.

The Court: Let him finish the question and then I will rule.

Mr. Lytle: I beg your pardon.

Mr. Collins:

Q. Do the veterans submit to a physical examination at the hands of the doctor recommending or disallowing the reinstatement?

The Court: Now, what is your objection?

Mr. Lytle: I object unless there is further foundation laid as to this doctor's knowledge as to the practice and procedure in the Veterans Bureau pertaining to reinstatements of insurance.

The Court: Objection sustained.

Mr. Collins:

Q. Doctor, you are the head of this home out here, are you not?

A. Hospital activities.

127 Q. Hospital. Do you know the practice right within your hospital there when any veteran in the government employ applies for reinstatement of a lapsed veteran's policy?

A. I only know in so far as the examination is concerned: When the application has been acted on and he is referred to us for examination, he is examined by one of the physicians. That is all we have to do with it.

Q. Why was Joseph H. Plant's signature put on here, if you know?

A. I don't know. Presumably, he made the examination.

Q. Yes. And are there various questions certified to by the doctor, Joseph H. Plant, here, who made the examination?

A. All of them are presumably made by him.

Q. Yes. And these questions are numbered consecutively, are they not?

A. Yes, sir.

Q. On this page?

A. They are.

Q. Over his signature. And question 5 relates to the pulse rate, does it not?

Mr. Lytle: If your honor please, I think—

A. It does.

Mr. Lytle: (Continuing.) I think the document speaks 128 for itself. It will be in evidence. If the plaintiff doesn't put it in, I will put it in. It speaks for itself.

The Court: You are wasting a lot of time, Mr. Collins. Objection sustained.

Mr. Collins:

Q. Well, what was the answer to question 21; the question is: "Do you recommend acceptance of the risk?" What was Dr. Plant's answer?

Mr. Lytle: If your honor please, I object; the document speaks for itself.

The Court: Well, he may answer.

A. The answer on this question is, "Yes, first class risk."

The Court: You mention about putting Exhibit 3 in evidence. My record shows that it was offered and that it had been received in evidence.

Mr. Lytle: I think that is correct. I think plaintiff put it in.

The Court: Exhibits 1, 2 and 3 have been received in evidence.

Mr. Lytle: Well, then, I object to it on the ground that the document speaks for itself..

The Court: Yes. The answer may stand.

129 Mr. Collins:

Q. Doctor, what percentage of disability entitles a doctor in a home to retirement?

A. I can't answer the question.

Q. How often did you see Dr. Pence at the home?

A. Well, approximately every working day, except the periods when he was on leave.

Q. Do you live on the home grounds?

A. I do.

Q. Did Dr. Pence live on the home grounds?

A. He did.

Q. And your contacts with him were almost daily?

A. Practically true, every working day, except when he was on leave, I saw him.

Q. As a doctor, Doctor, did Dr. Pence appear to you to be a man of good health?

A. Comparatively good health.

Q. Was he absent from his duties any more than any other doctor out there?

Mr. Lytle: I object to that.

The Court: Objection sustained.

Mr. Collins:

130 Q. Doctor, as a physician, I ask you if any man over 45 or 50 is, as a rule, disabled to a certain percentage?

Mr. Lytle: Object to the question as too general, calls for an expert witness. This witness isn't qualified as an expert. Too general.

The Court: Objection sustained.

Mr. Collins:

Q. You are a doctor of medicine, are you not?

A. I am.

Q. A physician?

A. Yes, sir.

Q. Where did you graduate?

A. University of Louisville.

Q. And how long have you practiced in the profession?

A. Since 1914.

Q. And in your present position, which you have occupied since 1927, have you observed the doctors working under you, and the patients in the hospital, to determine their physical ailments as to the presence or absence of any?

Mr. Lytle: Object to the question as having no bearing in this case.

The Court: Objection overruled.

131 A. I have observed the doctors, not all the patients. I haven't seen all of them.

Mr. Collins:

Q. But you observed the doctors working on them?

A. I have observed the doctors.

Q. If a doctor had more than a certain percentage, or had much of any disability, on your efficiency report you would report him as inefficient; wouldn't you?

Mr. Lytle: Object to the question, to the form of the question, and the substance of it.

The Court: Well, he may answer.

A. If the disability was of a degree to interfere with his performing his duties we would have to report him as inefficient.

Mr. Collins:

Q. Consulting the records that I showed you here, did you ever make any such report on Dr. Pence?

The Court: By such report you mean that he was not fit to continue work; is that what you are talking about?

Mr. Collins: Yes, efficiency report.

The Court: What we are trying to find out in this case is whether he made false statements intentionally on June 21, 1927. It seems to be going far afield.

132 Mr. Collins: Well, I will confine it closer.

A. There is nothing in this particular report more than he is below—marked below average in industry.

Mr. Lytle:

Q. What is the last, Doctor?

A. He is marked below average in industry.

Mr. Lytle: Below average.

Mr. Collins:

Q. Did you later make a report on that particular check that is put here?

A. I don't recall that I made any.

Q. Well, I will get that and show it to you later.

The Court: I haven't seen the proposed Exhibit Plaintiff's Exhibit 5. Will you hand that up to the bench? That is the June 6, 1932, Administrator's Board of Appeal document.

Mr. Lytle: It hasn't been received.

The Court: No, I haven't seen it.

(Document handed by counsel to the court.)

Mr. Collins:

Q. Doctor, do you know whether or not before a doctor is taken into the service he is subject to a physical examination?

133 A. He is subjected to a physical examination.

Q. I shew you what is a group of papers attached together, entitled "United States Civil Service Commission Application for Examination," signed by Lawrence W. Pence, and dated December 16, 1914, and ask you if you

know that that is the type of application which is presented to an applicant applying for a civil service position in the government?

Mr. Lytle: If your honor please, I have no objection, but to ask this witness—

The Court: Yes. Well, let us offer them in evidence and quit spending time on exhibits that can be offered in evidence without any further qualification.

We have spent just hours of extra time to no avail, and now I am going to—I want to give you as much latitude as I can, but I will have to confine you to what are the real issues in the case.

Mr. Collins: We ask that these photostats, consisting of seven sheets, entitled "Application for Examination," on the first sheet, and the lower sheets showing various officers' certificates and examinations, be marked for identification as a plaintiff's exhibit.

The Court: It may be so marked.

134 (Document referred to marked Plaintiff's Exhibit 8.)

Mr. Collins: We offer Plaintiff's Exhibit 8, being these photostats, in evidence.

The Court: It will be received.

(Said PLAINTIFF'S EXHIBIT NO. 8, so offered, was thereupon received in evidence.)

The Court: Is there any likelihood of any of those papers being referred to separately? Well, if so, we can mark them later on.

Mr. Collins:

Q. Do you know that Dr. A. R. Pearce is the Acting Regional Medical Officer?

A. I never knew him.

Mr. Lytle: If your honor please, Dr. Pearce is Acting Regional Medical Officer. There is no objection to it. The document speaks for itself.

The Court: Objection sustained.

Mr. Collins:

Q. Doctor, do you know whether or not the doctors under your charge at the home were ever cited to any hearing by the United States Government on account of the affidavits they signed on Pence of various applications?

135 Mr. Lytle: If your honor please, I object to that as having no bearing on the issues in this case.

The Court: Objection sustained.

Mr. Lytle: And I consider it prejudicial.

The Court: Well, the jury will be instructed to disregard the question entirely.

Mr. Collins: That is all for the present.

Cross-Examination by Mr. Lytle.

Q. Doctor, the earliest time of sick leave that the employees applied for sick leave was 1931?

A. Sometime in 1931.

Q. Before that, they had to take sickness off their annual leave?

A. That is correct.

Q. And they received 30 days' annual leave a year, I believe?

A. That was part of the time, that was true; I think that was true about that time.

Q. At that time, if they were home two or three days, it didn't make any difference if it was sickness or not?

A. It did not.

Q. They didn't have to get permission, to file permission, for leave?

136 A. It was just to prove that it was annual leave.

Q. Annual leave. I think, Doctor, you said the employee had to state the nature of his illness?

A. It has to be stated and approved by the doctor if it is over three days.

Q. And if it is less than three days he has to state what the cause of it is?

A. They do. There was a time when that wasn't required. If it was a small amount, but they are at the present time. I don't know whether it was on all those or not.

Q. Well, did he state the reason on those from 1931 on and, if he did state it, what reason he gave?

A. May I ask that I take each one individually to do it?

Q. Yes. And give the date.

A. On January 27, 1934, the nature of illness, "Abscessed tooth and neuritis, left shoulder and arm." September 26, '33, acute catarrhal fever and sinusitis acute. September 25, '33, sinusitis frontal. August 15, '31, stomach ailment. August 10, '31, stomach ailment. February 18, '32, cold. August 12, '32, colitis acute. January 26, '33, sinusitis frontal acute and Bleeding duodenal

ulcer. March 3, '33 he reported to the facility at Hines for examination and, if I may enlarge, that was considered sick leave if they were ordered in for examination. On September 17, sinusitis frontal. May 17, '34, sinusitis acute. Next one is annual leave for 45 minutes.

Q. Doctor, so you had no records of sick leave before 1931, is that right?

A. We have no records of that.

Q. And, Doctor, counsel asked you whether or not men who were examined, who were applying for reinstatement, were examined by the Veterans Bureau. I think you said it was, to the extent of your knowledge, the examination is. Do you know whether or not they have to be examined by a Veterans Bureau doctor, or can they be examined by any doctor?

A. I might not be able to answer that authoritatively.

Q. You don't know that, is that right?

A. I don't know whether that is the only way or not.

Q. And, Doctor, you said that your observation of Dr. Pence during the years when he was employed there, when you knew him from 1927 to '34, was that he was in comparatively good health. Now, as a physician, could you tell whether or not he had any physical defects from what observations you did make of him?

A. I couldn't from my own personal observation. I couldn't say what the physical defects might be.

138 Q. I see. And based on your observation of having seen him in comparatively good health, could he have had myocarditis, or sinusitis, and you not know anything of it in view of your observation?

A. Definitely, he could have had it.

Q. Doctor, do you recall about when Dr. Pence died?

A. I do.

Q. Did you sign the death certificate?

A. I did.

Q. Do you recall the cause of death, as you stated in the death certificate?

Mr. Collins: If the court please, I will object to that unless it appears that Dr. Thompson treated Dr. Pence before that death certificate.

The Court: Well, I suppose the death certificate is prima facie, and you can go into the questions as to what he had to base it on. I think that we should—are you going to introduce it?

Mr. Lytle: I am going to have the doctor identify it.

The Court: Identify it, and counsel will show what opportunity he had to pass on it.

Mr. Lytle:

139 Q. Dr. Thompson, I hand you defendant's Exhibit, for identification, "N", and ask you if that bears your signature?

A. It does.

Q. What is Defendant's Exhibit "N", Doctor?

A. The report to the Health Department of the death of Lawrence W. Pence.

Q. And signed by you?

A. It is signed by me.

Q. And did you make the report, Doctor; did you make that report?

A. I made this report.

Q. And did you state the cause of death therein?

A. I did.

Q. And what was the cause of death?

Mr. Collins: Just a moment. I object to that unless it is shown that the doctor treated Dr. Pence and was in a position to know, and I think there should be some preliminary question.

Mr. Lytle: If your honor please—

The Court: Objection overruled. You may answer.

Mr. Lytle:

Q. Please state the cause of death, Doctor.

A. The cause of death as shown on the death certificate is coronary thrombosis, sudden death, myocarditis
140 chronic, chronic sinusitis, nasal accessory sinusitis, with acute exacerbation.

Mr. Lytle: You may cross-examine.

Redirect Examination by Mr. Collins.

Q. Doctor, did you ever treat Dr. Pence as a physician?

A. I don't recall that I ever treated him.

Q. Do you recall now that he was absent for a few days shortly prior to his death?

A. I do.

Q. He had a cold, didn't he?

A. A cold and sinusitis, and I recall it that he told me he had it at the time.

Q. Are you a heart specialist?

A. I am not.

Q. He worked the day before he died; he worked all that day and died during the night, did he not?

A. That is correct.

Q. And did you or any other doctor in the home treat him during that last ten days of his life?

A. I did not; I don't know whether anyone else did, or not.

Q. You didn't assign anybody to treat him?

A. I did not. We do not, under those circumstances.

141 Q. If a man is seriously ill in a home, as head of that hospital you say you assign one of your doctors to go over there, do you not?

A. Not necessarily. We don't have to take care of them, as physicians; but we do as a courtesy to each other. Some one of the men will, on his own, go over, whoever the doctor wants.

Q. You don't have any knowledge of any doctor who treated him?

A. I don't have any knowledge of that.

Q. You didn't have any conversation with any doctor about his sickness there before you signed the death certificate?

A. Well, I couldn't recall all the details of that. I think we did discuss it, but I couldn't give you the details.

Q. Did you know of any doctor there who was called in shortly before he died?

A. I have no recollection of it.

Q. Now, you made no examination of Dr. Pence's heart during his life, did you?

A. I don't recall. I made no record of it, if I did.

Q. The fact is the death was sudden death, and eliminating other causes you thought it was coronary thrombosis, the usual cause of sudden death; isn't that the fact?

A. By elimination and by referring to the records
142 of previous examinations that had been made.

Q. How long before his death was it that you saw Dr. Pence, as you recall?

A. I saw him about four-thirty the evening before.

Q. He appeared to be all right then?

A. Not completely. He was complaining of being very tired, and said he thought he had come to work too soon after his illness.

Q. And he worked all that day just before he died that night?

A. He worked that day.

Q. Was there any autopsy on his body?

A. There was not.

Q. What is coronary thrombosis? Would you explain that to the court and the jury?

A. It is a blocking of one of the coronary vessels—well, I presume by a clot, ordinarily, by a blood clot.

Q. The coronary arteries and coronary vessels are the arteries which feed the heart, and supply the heart?

A. Supplying the heart muscles; that is correct.

Q. And there was a dam-up or some foreign substance got stuck in that coronary artery and prevented the proper functions of the heart, is that right?

A. I couldn't explain it exactly that way. I would
143 say that it is due to damaged coronary vessel wall, which causes a clot to form on it, ordinarily from some damage to the endyma of the coronary vessel.

Q. It is a sort of damage of the artery that feeds the heart?

A. After the clot begins to form it does block.

Q. And is it rather common between the ages of 50
and 60, for men?

A. Well, not infrequent.

Q. You knew that Pence had made various applications for disability allowance and retirement while he was in the Home between '28 and '34, did you not?

Mr. Lytle: I object to the question.

The Court: Objection overruled.

A. I have no definite information more than hearsay from conversation.

Mr. Collins:

Q. And you made no examination of the heart before you put myocarditis in here?

A. I depended upon the examination reports that were on record.

The Court: Just tell the jury what you mean by myocarditis.

Mr. Collins:

Q. Yes, what is it?

144 A. Well, it is a damage of the heart muscle ordinarily from toxic condition—well, presumably from toxic condition you have a damage of the heart muscle,

probably it may be replaced by fibrous tissue, or just a degeneration of the heart muscle, depending in the type of myocarditis it might be.

Q. Doctor, when you say it is due to toxic condition within the system, will you explain just when a toxic condition arises?

A. Sometimes from some infection, sometimes from an infectious disease you get a damaged heart muscle.

Q. It is the presence of infectious matter in the blood stream, is it not, the toxic condition?

A. That is one of the recognized causes, yes.

Q. Well, what are the others?

A. Well, various toxic material in the blood might be from chemicals taken in.

Mr. Lytle:

Q. What is that?

A. It would be damaged from chemicals taken into the body.

Mr. Collins:

Q. It is something in the blood that is really foreign to health and impairs health, is that right?

A. That is a general conclusion, yes.

145 Q. Poisons the blood, so to speak, is that right?

A. That would be one way of putting it, I presume.

Q. And because of the condition of the blood it doesn't properly build up the walls of the heart, is that it?

A. Well, it damages the—

The Court: I never found a lawyer that could give a description of diseases, so let us say that the myocarditis caused an impairment of the muscles of the heart. Let us not get into any more difficulty with that.

Mr. Collins:

Q. Could you tell us where the sinuses are and what is known as a frontal sinus? Where are they and what are they?

A. Well, the frontal sinuses are the sinuses in the frontal bone just above the orbits of the eyes.

Q. Just what is a sinus, what do you mean by "sinus"?

A. It is simply a cavity in the bone lined with mucous membrane—lined with mucous membrane and contains air, supposed to be normally—normally it is connected with the nose, the interchange of air between the nasal cavity and the sinuses.

Q. And do the sinuses connect with anything besides the nose?

A. You mean the cavities themselves, the air in the cavity?

Q. Yes.

146 A. No. All through the nasal cavity.

Q. Sinuses aren't these cavities that run from the nose to the ear?

A. No.

Q. And the disease known as sinusitis is just what, with reference to the sinuses?

A. Simply an inflammation of the sinus involving the mucous membrane, infection of some kind.

The Court: If a person has sinusitis, doctor, does it remain constant or may it get better and then come back again?

A. It may get better and then have exacerbation later.

Mr. Collins:

Q. Is sinusitis in mild form rather common in this climate?

A. It is considered so, I believe.

Q. Anyone with a bad cold may develop sinus trouble?

A. They may.

Mr. Collins: That is all.

Recross Examination by Mr. Lytle.

Q. Doctor, just one or two yestions. I think you mentioned that myocarditis resulted from infection.

147 A. That may be one of the causes, I stated.

Q. And I think you said sinusitis is an infection?

A. I did.

Q. And infection means bacteria or poison getting into the canals, is that correct?

A. That is in substance what it means.

Q. And might the infection of sinusitis get into the blood stream?

A. The toxin from it could, yes.

Q. And have it be a contributory cause to myocarditis?

A. I so considered. That is why I put it on.

Q. Sinusitis is a contributory cause to myocarditis?

A. It is a possible cause.

Q. And myocarditis is a contributory cause to coronary thrombosis?

A. That is true.

Q. What is that?

A. That is in substance the reasoning I had on it.

Mr. Lytle: That is all.

Redirect Examination by Mr. Collins.

Q. The sinuses manifest themselves in the inflammation of the mucous membrane, the mucous lining, that tube of sinus?

148 A. It does, yes.

Q. And that in turn is caused by some kind of infection?

A. Ordinarily that is true.

Q. May just a bad cold?

A. It may have its origin with a bad cold.

Mr. Collins: That is all.

Recross Examination by Mr. Lytle.

Q. Dr. Pence was an eye, ear, nose and throat specialist?

A. He was.

Q. And he specialized in eye, ear, nose and throat practice at your facility?

A. Yes.

Q. Under your charge.

A. Correct.

Q. And sinusitis comes under eye, ear, nose and throat?

A. That is correct.

Mr. Lytle: That is all.

Redirect Examination by Mr. Collins.

Q. Doctor, you are not a specialist in eye, ear, nose and throat?

149 A. I am not.

Q. You are not a specialist in heart, are you?

A. No, I am not.

Q. Just a general practice, is that it?

A. Yes. General internist, call it that.

Mr. Collins: That is all.

The Court: Well, now, listen here. I will give you some leeway. We can't have a seesaw here all day long.

You are excused, doctor.

(Witness excused.)

Mr. Collins: I ask that the certified photostatic copy of the record of physical examination and the waiver of Pence and disclaimer of any disease or disability at the time of his discharge from the Army be marked for identification, as a plaintiff's Exhibit, this group of papers which are attached under seal of the War Department.

Mr. Lytle: I have no objection to the authenticity, but I object to it because it pertains to a period prior to the period in issue in this case. The questions that Dr. Pence answered allegedly fraudulent, were whether he suffered any diseases or so forth from the date of the lapse of his policy in 1920. This pertains to 1918 and '19.

150 The Court: Well, it may not have much relevancy but it is leading up to the period with which we are much concerned with. I will permit it to be received in evidence.

I will say to the jury that it is not of much relevancy. It may depend upon how the testimony develops.

Mr. Collins: For the record, the discharge has been marked Plaintiff's Exhibit 9 for identification.

The Court: It will be received subject to the objection that counsel has made; the materiality as to being relevant.

Mr. Collins: We offer in evidence—before I make this next offer I call attention to the fact that in Plaintiff's Exhibit 9 the third sheet thereon, signed by Lawrence W. Pence, at Des Moines, Iowa, July 16, 1918: "I certify to the best of my knowledge and belief that I am not affected with any form of disease or disability which will interfere with the performance of the duties of the office for appointment to which I am now about to undergo examination." And that was the application made for admission to the service in that certification made in regard to that.

The Court: Well, it doesn't prove a great deal whether he did or did not have a disability at that time. The 151 question is whether he was in as good health on January—or June 21, 1926, as he was when the policy defaulted, which was February 1st, 1920, or whether he made false answers to those other questions which have been referred to heretofore, being treated by the physician for disease.

Mr. Collins: I ask that the report of physical examination dated at Milwaukee, Wisconsin, 10-10-28 regarding

Lawrence Pence, be marked for identification as a plaintiff's exhibit.

(Document referred to marked as Plaintiff's Exhibit 10.)

Mr. Collins: We now offer this report of examination, Plaintiff's Exhibit 10.

The Court: It will be received.

(Said exhibit, PLAINTIFF'S EXHIBIT 10, so offered, was thereupon received in evidence.)

Mr. Collins: We call attention to the fact that on the second sheet of that examination, which is dated 10-10-28, "X-ray shows that all sinuses clear." Under "Diagnosis": "Lessened myocardial tone and reserve. Myocardial degeneration beginning."

I now ask that the decision of the United States Veterans Bureau, Central Board of Appeals, Section A,—

152 Mr. Lytle: Just a minute.

The Court: If counsel makes an objection, don't start.

Mr. Lytle: I object to it and object to him reading the title. That is one of the matters of the controversy which we discussed.

The Court: We will excuse the jury for a recess of ten minutes, and in the meantime you can make your offer, Mr. Collins, out of the presence of the jury.

The jury will be excused for ten minutes.

(Whereupon the jury retired from the court room and the following proceedings were had out of the hearing and presence of the jury.)

The Court: Do you desire to make your offer of proof and to identify the document. You may do so.

Mr. Collins: I intended to read the heading and have it marked for identification without reading any of the substance of it.

The Court: Yes.

Mr. Collins: We offer, or we ask that the decision of the United States Veterans Bureau, Central Board of Appeals, Section A, Washington, D. C., dated April 18, 1930, be marked for identification as a plaintiff's exhibit, and
153 then we will offer it.

The Court: Let it be marked.

(Document referred to marked as Plaintiff's Exhibit 11.)

Mr. Collins: We now offer PLAINTIFF'S EXHIBIT 11 in evidence.

Mr. Lytle: Defendant objects to Plaintiff's Exhibit No.

11, which is a finding by the Central Board of Appeals, Section A, of the United States Veterans Bureau, Washington, D. C., pertaining to a matter having no bearing on the issues involved in this case, namely, this is referred under 208, the veteran having appeal, the Emergency Board denying the retirement benefits.

The Court: Is that a preliminary determination to the determination of the Administrator's Board of Appeals that has been marked Exhibit 5, or is that another matter?

Mr. Lytle: No, this is another matter. This is by the Central Board, not the Administrator's Board of Appeals who pass only on compensation, disability allowance, and officer's retirement pay, and this, and I object for the further reason that it is not only irrelevant and immaterial to the issues in this case, but an administrative conclusion of one—four doctors—and if admitted would constitute an opinion on an opinion and by one layman who is not competent to pass on the medical claims, as upheld by *Third National Bank v. United States*.

Mr. Collins: Had you finished?

Mr. Lytle: Yes.

Mr. Collins: Well, I think the case that counsel cited yesterday doesn't stand for the proposition that he contends for. The law is that an officer of the government acting in a sufficient capacity almost rarely not knowing personally the man who is before him, is presumed by virtue of his office and by the integrity which is imputed to that office, to have decided correctly.

Now, the question is, in this case, what Pence's health was at the time of his reinstatement, and what his condition of health was between the lapse and the time of reinstatement, and there is always a doctor on these boards, and that appeal—there is an appeal from a decision involving medical examinations by the United States Government and those people and these boards handle thousands of these cases a year and are put in those positions because they know what to do.

155 Just a few words from a few decisions, and I will leave the court copies; and I will try to give counsel copies of these decisions.

Now, the reason that those—they are, of course, a violation of the hearsay rule, but there is an exception made in regard to any official document signed by an officer of the United States in his official capacity, whether it be a

medical report or a general report, and these few quotations that I will take time to read, just a few extracts from these decisions, I think will substantiate my position.

In the case of *Demeter v. the United States*, 66 Fed. "No. 8 concerns the competency of certain records of examination of plaintiff and files of the Veterans' Bureau on the grounds that they are hearsay. Their source being stipulated, we believe them admissible under the authorities as exceptions to the hearsay rule, as government's records kept by government officials in the regular course of duty."

In the *United States v. Timmann*, 68 Fed. (2d), 654, report of a government physician of a physical examination of a veteran at Veterans' Bureau, and there filed, in evidence, notwithstanding the maker of it is not sworn and cross-examined.

156 The Court: I don't think there is question at all about these doctors' examinations, that the examinations that the government doctors made are competent evidence. The question of whether the determination of the board, of another board under another law, is competent is quite a different thing. For instance, the disability—you have a percentage of disability—you had to have at least a ten per cent disability, as I recall it, before a person could be qualified under the law. Well, because a board held that an applicant was not ten per cent disabled, for instance, or maybe a greater percentage, that isn't determinative as to whether or not his condition of health was so, whether he made certain statements that were true or false. The only thing that I will be frank to say that concerns us here in this case is that the government intends to use statements that Dr. Pence made wherein he said he was afflicted with certain disease. Now, then, the Board, in fact, found in their decision, in the course of making their decision, that it wasn't so,—this one here that I have from the Administrator's Board that he didn't have sinusitis.

Now, it does seem manifestly unfair on the face of it for the government to use a statement of a man trying
157 to get disability claiming he had sinusitis when the government claims he doesn't have sinusitis, used to prove it in this case that he did have sinusitis. It doesn't seem that the government is acting with very good faith in making that contention.

The difficulty that I see is that,—Mr. Collins,—where a

determination was really not entire, that the statements which they made, which the government intends to use, were not true, but that they didn't qualify a certain sufficient disability; in other words, to get disability payments or retirement pay. I haven't entirely made up my mind as to what I can do about such offer, although I will say to the representative of the government it doesn't seem right to me, it doesn't seem fair to me, because I happen to know—off the record.

(Whereupon there was an extended discussion off the record.)

The Court: We won't take any more time. I gave it considerable consideration this last evening, read all the cases that I could find on it. We will proceed and we will withhold ruling on that until after the noon hour.

Mr. Lytle: May I make one statement?

158 The Court: Yes.

Mr. Lytle: Every case—not that I am smart—but this is my work and I have to know these cases, but every case that Mr. Collins has cited to show the admissibility of these rating sheets, these board findings, are as to the admissibility of the physical examination.

The Court: All right. Bring back the jury.

(Whereupon the jury returned to the court room and the following proceedings were had.)

Mr. Collins: Are these the exhibits?

Mr. Lytle: Yes. There is one more, and the one that your honor had.

The Court: Yes. I say I don't care to have them offered at this time.

Mr. Collins: The ruling doesn't effect, as I understand it, the medical reports.

The Court: Oh, no. You may introduce the medical reports.

Mr. Collins: Then I will just hold these others in abeyance. I ask that the application for conversion of United States Government Life Insurance dated June 21, 1927, be marked as a plaintiff's exhibit, which has heretofore
159 been marked as Defendant's Exhibit H, and be marked for identification as a plaintiff's exhibit.

(Said document referred to was marked as Plaintiff's Exhibit 12.)

The Court: Now, you have taken two exhibits, as I understand it. One was "I" and the other is "H".

Mr. Collins: And we offer this Plaintiff's Exhibit 12 in evidence.

The Court: It will be received.

(Said exhibit, PLAINTIFF'S EXHIBIT 12, so offered, was thereupon received in evidence.)

Mr. Collins: We now ask that the report of physical—

The Court: Just a minute. Do I understand that this is the situation, that on June 21 it was not only an application for a reinstatement of the insurance but there was also an application for the conversion?

Mr. Collins: That is right.

Mr. Lytle: The one depended on the other.

The Court: That is right.

Mr. Collins: We ask that the report of physical examination of Lawrence W. Pence, dated at Milwaukee, 160 Wisconsin, 6-3-29, be marked for identification as a plaintiff's exhibit.

(Said document referred to was marked as Plaintiff's Exhibit 13.)

Mr. Collins: The report has been marked Plaintiff's Exhibit No. 13, and we now offer it in evidence.

The Court: It will be received.

(Said PLAINTIFF'S EXHIBIT 13, so offered, was thereupon received in evidence.)

Mr. Collins: The report of physical examination of Lawrence Waldo Pence, examined at the National Home, Wisconsin, 11-12-30, we ask be marked for identification as a plaintiff's exhibit.

(Said document referred to was marked as Plaintiff's Exhibit 14.)

Mr. Collins: This report has now been marked Plaintiff's Exhibit 14, and we now offer it in evidence.

The Court: It will be received.

(Said PLAINTIFF'S EXHIBIT 14, so offered, was thereupon received in evidence.)

Mr. Collins: We ask that the report of physical examination of Lawrence W. Pence, dated at Waukesha, Wisconsin, on May 27, 1931, be marked for identification 161 as a plaintiff's exhibit.

(Said document referred to was marked as Plaintiff's Exhibit 15.)

Mr. Collins: The report of physical examination has now been marked Plaintiff's Exhibit No. 15, and we offer it in evidence.

The Court: It will be received.

(Said PLAINTIFF'S EXHIBIT 15, so offered, was thereupon received in evidence.)

Mr. Collins: We ask that the roentgenologist report dated 7-22-31, be marked for identification as a plaintiff's exhibit.

(Said document referred to was thereupon marked as Plaintiff's Exhibit 16.)

Mr. Collins: This roentgenologist report has been marked Plaintiff's Exhibit No. 16, and we offer it in evidence.

The Court: It will be received.

(Said PLAINTIFF'S EXHIBIT 16, so offered, was thereupon received in evidence.)

Mr. Collins: We ask that the roentgenologist report dated August 1st, 1934, be marked for identification.

(Said document referred to was thereupon marked 162 Plaintiff's Exhibit No. 17.)

Mr. Collins: This report has been marked Plaintiff's Exhibit 17 and we now offer it in evidence.

The Court: It will be received.

(Said PLAINTIFF'S EXHIBIT NO. 17, so offered, was thereupon received in evidence.)

Mr. Collins: We ask that the general medical and special cardiac examination of Lawrence W. Pence at the Edward J. Hines Hospital, Hines, Illinois, dated February 27, 1933, consisting of 11 sheets, be marked for identification as a plaintiff's Exhibit.

(Said document referred to was thereupon marked Plaintiff's Exhibit No. 18.)

Mr. Collins: Said report has been marked Plaintiff's Exhibit No. 18, and we now offer it in evidence.

The Court: It will be received.

(Said PLAINTIFF'S EXHIBIT 18, so offered, was thereupon received in evidence.)

Mr. Lytle: Mr. Collins, there is no objection. The original having been destroyed, there is no objection to it as secondary evidence.

Mr. Collins: I offer a letter which was produced 163 by the government, being a carbon copy of a letter dated at Sioux Falls, South Dakota, December 9, 1931, signed by A. R. Pearce, signature on the copy being type-written, Regional Medical Officer, Sioux Falls, South Dakota. We ask that this letter be marked for identification as a plaintiff's exhibit.

(Said document referred to was marked Plaintiff's Exhibit No. 19.)

Mr. Collins: The letter has been marked Plaintiff's Exhibit 19.

The Court: It is received with the understanding that the original has been lost and this is a carbon copy.

(Said PLAINTIFF'S EXHIBIT NO. 19, so offered, was thereupon received in evidence.)

The Court: I am not going to permit you to introduce just offhand X-ray plates. Let the doctors get on the stand and read them. The jury can't read an X-ray plate and neither can I.

Mr. Collins: What I intended to do was either have the doctor that made them, or another doctor, interpret them.

The Court: Well, it seems to me—of course, you made your prima facie case. It is really the proper order to let the government go ahead on their case. They will introduce these matters with the doctor's testimony, I assume. If they don't, you will have a chance for rebuttal.

Mr. Lytle: Your honor, may I say something?

The Court: Yes.

Mr. Lytle: I subpoenaed witnesses here with these films because counsel served me with a notice to produce. Now, the reports of those films by the doctors who made them have already been introduced in evidence by plaintiff's counsel. There is no necessity for the films to go in.

The Court: Well, I can't see any necessity anyway. There is no necessity in submitting X-ray films except in connection with doctors' testimony, so they can read them to a jury or to a court. We don't understand them, and I don't think that they should be admitted at this time.

Mr. Collins:—Then I ask you for Dr. Pence's various applications for retirement and disability. I just wish it might be understood that when exhibits are introduced in the record, I think, in fairness to plaintiff's counsel, they should be left in the custody of the clerk.

The Court: I think that is the practice here. Of course, after they are once introduced they will be in the custody of the clerk and he can keep track of them.

165 Mr. Collins: For my ease in consulting them, I can get the exhibits. There is a lot of exhibits, and I do want to know what is in them, and it is pretty hard—

The Court: Well, counsel for the government is under no duty to leave anything with the clerk until after each particular exhibit has been introduced in evidence.

Mr. Collins: The only thing that counsel has introduced or that I have—if you have any exhibits, will you give them to the clerk so that each of us can have access to them?

Mr. Lytle: Those papers you just asked for were not in evidence, Mr. Collins.

Mr. Collins: This is the exhibit, Plaintiff's Exhibit 3. That is in evidence.

The Court: I don't want any exhibits, counsel, after they have been introduced in evidence, to take or examine the documents—only in the presence of the clerk or deputy.

Mr. Collins: I want to say this to the court; I would like, over the noon hour, to check again, very carefully, into these four applications before deciding what to do, and I will be willing to start—

The Court: Well, the government is cooperative. You have asked him to produce various documents that you—
166 had no access to, and they have done so, and I am sure that counsel have cooperated with you.

Mr. Lytle: I have submitted them to him before the trial and he has examined them and I am producing them now after trial.

Mr. Collins: I am not complaining of counsel. I am just wondering if I could have until court reconvenes this afternoon before I rest my case to check again finally.

The Court: Well, it is fifteen minutes of twelve. We will reconvene at two o'clock.

The jury will be excused at this time. I want to say to counsel that the clerk will take care of the exhibits, those that have been introduced. You might take the pleadings which I have had heretofore, too.

(Whereupon an adjournment was taken to two o'clock P. M. of the same day.)

167

Milwaukee, Wisconsin,
Tuesday, April 16, 1940,
Two o'clock P. M.

Court met pursuant to recess last above noted.

All parties present. Jury in the box.

Mr. Collins: There was identified, but not offered or received, Plaintiff's Exhibit No. 4.

Mr. Lytle: No objection.

Mr. Collins: Which is the application for United States Government Life Insurance dated June 29, 1932. We now offer that Plaintiff's Exhibit in evidence.

The Court: It will be received.

(Said PLAINTIFF'S EXHIBIT NO. 4, so offered, was thereupon received in evidence.)

Mr. Collins: I would like to get a line on what 11 and 12 are.

The Court: 11 is the decision of the Board of Appeals; 12 is the application for the conversion of insurance. 12 has been admitted.

Mr. Collins: I would like now to call attention to a few things here and there in exhibits 10, 11, 12, 14 and 15.

The Court: You can't call any attention to Exhibit 11 because it hasn't been admitted in evidence.

Mr. Collins: Not 11. It will be very short.

The Court: You may invite attention to any particular part.

Mr. Collins: Yes. Plaintiff's Exhibit 10, being a report of the physical examination of Lawrence Pence. He was examined at Milwaukee, 10-10-28. That would be October 10, 1928. On the reverse side of the first sheet of that exhibit is found the following: "X-ray shows all sinuses clear." and under the heading "Diagnosis" "Lessened myocardial tone and reserve. Myocardial degeneration beginning."

Mr. Lytle: If your honor please, may I call attention to certain things in Plaintiff's exhibits when I put my case on that he doesn't read?

The Court: Oh, sure. Such additional parts as you desire that have not been called to the attention of the jury, you may do so in presenting your case.

Mr. Collins: Oh, sure. Report of physical examination of Lawrence W. Pence.

The Court: What exhibit are you reading from?

Mr. Collins: I am reading from Exhibit No. 13. Milwaukee, Wisconsin, 6-3-29—June 3, 1929—"Diagnosis: 169 No definite cardio-vascular diseases noted." Under the heading of "Examination: There is no objective evidence of respiratory or circulatory distress. Heart is not enlarged, not displaced, action regular. Apex beat is not unusually forceful or heaving. Myocardial tone is fairly good. Sounds fairly well sustained. No unusual accentuations. Exercise fifty hops elicits no dyspnea or cyanosis. Tone continues good. No murmur, no thrill. Rate at rest is 80, after exercise 96, after two minutes 80. Blood pressure 130/90."

Under the heading of "Examination by Dr. Edward R. Ryan." "Anterior pillars and pharynx are slightly congested. Tonsils are small, of the buried type and infected. No free pus was expressed. Deviation of the septum to the right and a good sized ridge low down on the right side. Nasal mucous membranes are normal. Turbinate bodies are not trugescent and there is no pathologic secretion on either side of the nose."

The report is signed by Edward R. Ryan, M.D., Henry Kuhn. Under "Edward R. Ryan, M.D.," is "E. E. N. T. Specialist." Under his name is "Geo. A. McBride, M. D., Medical Examiner."

Exhibit 14 is a report of physical examination of Lawrence W. Pence, at the National Home, Wisconsin, 11-12-30

—November 12, 1930—general diagnosis, based on entire physical condition. Sinusitis, frontal, chronic, moderate, severe, permanent. Ulcer, duodenal, moderate, severe, permanent. Myocarditis, chronic, mild, permanent. Appendicitis, chronic. X-ray diagnosis—permanent. That is signed by C. O. Diamond, Assistant Surgical Examiner, National Home, Wisconsin.

Plaintiff's Exhibit 15 is a report of the physical condition, or rather, examination, of Lawrence W. Pence, examined at the United States Veterans' Home Hospital, Waukesha, Wisconsin, May 27, 1931. On the reverse side: "General diagnosis based on entire physical condition. Sinusitis, frontal, moderate, permanent. Ulcer, duodenal, chronic, moderate, permanent. Appendicitis, chronic, moderate, permanent. Myocarditis, chronic, moderate, per-

manent. Deviated nasal septum, moderate, permanent." This examiner was a ward surgeon in the United States Veterans' Hospital at Waukesha, Wisconsin, and his name is A. E. Minsky.

Reading from Plaintiff's Exhibit 16, which is a clinical record and roentgenological report, dated 7-22-31—July 22, 1931—the place where the examination was held does not appear, but it was an examination of Lawrence Pence, M. D., Milwaukee. "Some increased density interior portion left maxillary sinus."

171 Exhibit 17, bearing date of August 1st, 1934, is signed by J. Prill, Medical Officer. Down below is the date of August 2nd, 1934. It is "Roentgenological examination requested." and the part I am reading now appears to be over L. Grant Glickman's name, M. D.

"X-ray Fluoroscopic findings. Copy of X-ray report of May 22, 1934. Examination of the accessory nasal sinuses in three positions reveals a veiling opacity involving the lower portion of both maxillary sinuses and the right frontal sinus." Down below is the name of L. Grant Glickman, M. D., and the patient was Lawrence W. Pence.

Taking now Plaintiff's Exhibit No. 18, which is a report of the general medical and special cardiac examination held February 27, 1933. In the upper right-hand corner appears "Edward Hines, Jr., Hines, Illinois, Out Patient Clinic, February 27, 1933." There are a number of pages to that.

The Court: How many to that?

Mr. Collins: Eleven pages. They have on page five of that report of examination, under date of February 27, 1933, a graph or some kind of a representation of heart action—I am just calling attention—

The Court: Don't attempt to try to explain that to 172 the jury.

Mr. Collins: I am not going to try to explain it. I am going to let a doctor. I couldn't explain it.

The Court: I knew that.

Mr. Collins: The ninth sheet of that exhibit is a special eye, ear, nose and throat examination, Veterans Administration, Hines, Illinois. The date is 2-27-33. "Nose fair ventilation—profuse mucous and pus discharge both nares, marked tenderness over frontal sinuses. Mild deviated septum. X-ray sinuses. X-ray shows: all sinuses to be clear and normal."

The next page, which would be the tenth page, the roentgenological request and report at Veterans Administration, Hines, Illinois, under date of 2-27-33. "To determine the presence of sinusitis. Clinical History: Fair ventilation. Profuse mucous and pus discharge from both nares. Marked tenderness over the frontal sinuses. Mild deviation of the septum. Part to be examined: all sinuses. Medical Officer, Dr. A. Field, Medical Officer, V. A."

The next is dated 2-27-33: "Roentgenological report. Sinuses: The roentgenological examination of the nasal accessory sinuses shows all sinuses to be clear and well 173 aerated. There is no demonstrable X-ray evidence of pathology.

"Summary: Sinuses normal."

The date of that last sheet I read was 2-27-33. It is the tenth page of this Exhibit 18.

The Court: Anything further?

Mr. Collins: Just one thing further.

The Court: We will have to proceed, Mr. Collins. We can't wait around here.

Mr. Collins: The plaintiff is ready to rest and I want to speak to my client just one-half moment.

The Court: All right.

Mr. Collins: The plaintiff rests. Just a moment. I don't know whether the court wanted to make a ruling on that offer.

The Court: The offer of those exhibits 5, the Administrator's Board of Appeals' decision, and on Exhibit 11, the decision of the Central Board of Appeals, the ruling of the court is that these decisions are not admissible and will not be received at this time. Possibly something might occur in the course of the defendant's case so that it will be without prejudice your renewing the offer in your rebuttal, if you so desire.

174 Mr. Lytle: Defendant offers in evidence DEFENDANT'S EXHIBIT J.

The Court: Plaintiff's Statement of September 7-28?

Mr. Lytle: Is that received?

The Court: Well, I want to know is it the claim and statement of September 7, 1928?

Mr. Lytle: September 7, 1928.

The Court: Received.

Mr. Lytle: Defendant offers in evidence Exhibit D, application for compensation of Lawrence W. Pence.

The Court: It will be received.

(Said DEFENDANT'S EXHIBIT D, so offered, was thereupon received in evidence.)

Mr. Lytle: Defendant offers that part of the defendant's Exhibit D—

The Court: It has all been received.

Mr. Lytle: That was dated August 27, 1928. Defendant offers in evidence Defendant's Exhibit K, medical and industrial history statement signed by Lawrence W. Pence, dated October 10, 1928.

The Court: It will be received.

(Said DEFENDANT'S EXHIBIT K, so offered, 175 was thereupon received in evidence.)

Mr. Lytle: Defendant offers in evidence Defendant's Exhibit N, signed by Lawrence W. Pence, dated May 24, 1929.

The Court: It will be received.

(Said DEFENDANT'S EXHIBIT N, so offered, was thereupon received in evidence.)

Mr. Lytle: Defendant offers in evidence Defendant's Exhibit F, the application for disability allowance executed by Lawrence W. Pence, July 14, 1930, executed by Dr. Lawrence W. Pence.

The Court: Received.

(Said DEFENDANT'S EXHIBIT F, so offered, was thereupon received in evidence.)

Mr. Lytle: Defendant offers in evidence Defendant's Exhibit 11 in his handwriting.

The Court: 11?

Mr. Lytle: Defendant's Exhibit L, which is undated but received in the Veterans' Bureau on November 28, 1931.

The Court: Received.

(Said DEFENDANT'S EXHIBIT L, so offered, was thereupon received in evidence.)

Mr. Lytle: Defendant offers in evidence the two-176 page letter signed by Dr. Lawrence W. Pence, dated December 8, 1933. That is Defendant's Exhibit M.

The Court: Received.

(Said DEFENDANT'S EXHIBIT M, so offered, was thereupon received in evidence.)

Mr. Lytle: Defendant offers in evidence Defendant's Exhibit G, application dated December 8, 1933, as signed by Dr. Lawrence W. Pence.

The Court: Received.

(Said DEFENDANT'S EXHIBIT G, so offered, was thereupon received in evidence.)

Mr. Lytle: Defendant offers in evidence Defendant's Exhibit P, certified, authenticated copy of the regulation of the United States Veterans' Bureau, No. 14 and 15, pertaining to reinstatement conversion.

The Court: It will be received.

(Said DEFENDANT'S EXHIBIT P, so offered, was thereupon received in evidence.)

Mr. Lytle: May I read these at this time?

The Court: Yes.

Mr. Lytle: Reading from Defendant's Exhibit J, entitled "Claimant's Statement," signed by Dr. Lawrence W. Pence, September 7, 1928: "I am now suffering from a disability as follows: sinusitis frontal, chronic. Ethmoiditis, chronic. Atrophic rhinitis, chronic, with loss of sense of smell. Myocarditis, chronic.

"That I incurred the disability or disabilities mentioned at or near Camp Dodge, Iowa, on or about October, 1918, under the following circumstances: Contracting influenza in line of duty. Stationed at Tent City, Camp Dodge, Iowa. Later transferred to base hospital in charge of influenza and pneumonia wards. Influenza mostly confined to nose and throat infection. That during my military service I was not treated at the hospitals named: Remained in quarters and treated myself. Other doctors overworked and not available. Was able to carry on but developed a sever frontal sinusitis and acute myocarditis. Since discharge the sinuitis has become more severe with constant frontal headaches, making it necessary for me to give up my practice and find employment where I could be inside. Cannot stand any exposure to cold.

"That I was discharged from the service on January 9th, 1919.

"That immediately and two month after discharge the disability mentioned (above) manifested itself and I noted the following symptoms: Constant frontal headaches with discharge from nares and dripping in throat, with shortness of breath and exhaustion on trying to do any work. Later there was a constant dryness in nose, and still later began to notice loss of sense of smell. For nearly one year after returning from service a tendency to sleep was very noticeable. Only by moving about could sleep be warded off. This symptom gradually be-

came less noticeable but the shortness of breath still continued. A feeling that there was gas in the room was noticeable. There seemed to be a constant 'air hunger'. This is still noticeable and is due to this myocarditis. Am working, but under a considerable handicap.

"That a physician was called in to treat me on January, 1927, when he pronounced my disability sinusitis frontal, acute exacerbation, and prescribed serum and local treatment tending to induce drainage. Treatment was carried out by myself. Was confined to bed for eight days."

It is signed "Laurence W. Pence" before a notary public. It was sworn to before a notary public September 7th, 1928.

Of Defendant's Exhibit D I will read such parts as are relevant, your Honor.

179. "Application of Veteran Disabled in the World War for Compensation and Vocational Training" is the title, and it is signed by Dr. Laurence W. Pence before a notary public on August 27th, 1928.

"Nature of disability claimed:" (For which compensation is claimed) "Sinusitis and ethmoiditis chronic and chronic atrophic rhinitis with partial loss of smell. Myocarditis.

"Where received? In service."

"Cause of disability? Flu in service."

"Have you been confined to bed or in hospital since discharge? Home, numerous times in winter."

"Are you willing to accept medical or surgical treatment if furnished? Yes."

Defendant's Exhibit K, "Medical and Industrial History." The statement is signed by Laurence W. Pence. It is dated October the tenth, 1928.

"In the following spaces show the time lost from work during the period for which you are reporting, and state the disease or disability which caused the loss of time in each instance, and the medical treatment received: Lost about two or three weeks per year on account of sinus trouble. While in private practice lost about one-half time."

180 Defendant's Exhibit E is an application for Emergency Officers' Retirement Pay executed by Laurence W. Pence before a notary public on May 24, 1929.

"I hereby apply for the benefits * * *" and so forth.

"Name of officer: Pence, Lawrence W."

"Rank: First-Lieutenant.

"State physical disability incurred during service and in line of duty; when and where it was incurred:

"Disability: Chronic ethmoiditis, sinusitis, frontal, myocarditis.

"Incurred at Camp Dodge, Iowa.

"Treated self at Camp Dodge, Iowa from October, 1918."

Defendant's Exhibit F is an "Application of Veteran for Disability Allowance," and it is executed by Dr. Laurence W. Pence, July the 14th, 1930, before a notary public.

"Nature of disease or injury on account of which disability allowance is claimed: Sinusitis, frontal; gastroptosis, healed (?), duodenal ulcer; myocarditis chronic."

Defendant's Exhibit L—I wish to read all of this, your Honor. It is undated, but the letter was received from Dr. Laurence W. Pence—it is undated, but received by the Veterans' Administration Bureau of National Homes, Milwaukee, Wisconsin, on November 28, 1931.

181 "Supplementary information in connection with the application and affidavit of Laurence W. Pence for rating and retirement under Officers' Retirement Act."

"This supplementary report is given to clear some points which may appear conflicting or ambiguous or not in sufficient detail. The phrase 'I treated myself' should read that I administered the treatment and medication as furnished and directed by Major De Weise, who was camp physician and by whose authority I was permitted to remain in barracks, under his special care. By 'No doctors available' was meant that there were no doctors assigned to treating men in barracks.

"It was not unusual for medical officers and sometimes other officers to be allowed to stay in barracks under the care of their fellow officers, who now find themselves with no official record of illness in service.

"The incidents preceding and leading to the diagnosis of acute myocarditis are these:

"One night when Major DeWeise came in he found me sitting on the side of the bed. On being told that I was doing it because of difficulty in getting my breath and that I thought it was due to soft-coal gas he examined my chest with a stethoscope and said, 'Man your heart is
182 shot'. He got me some medicine which relieved the symptoms and which I continued to take as per his

directions for several weeks. He told me I had acute myocarditis and that it would be necessary to take things rather quietly for some time. The acute severe gastric upset to which he alludes, turned out to be a forerunner of duodenal ulcer, which perforated in 1920 and again in 1925. Because of continuous distress and tarry stools I requested a G. I. X-ray at the United States Veterans Bureau regional office at Sioux Falls, South Dakota, where I was then assigned to duty. The diagnosis at that time was duodenal ulcer active. The diagnosis of appendicitis chronic was made from X-ray findings only.

"I am aware that resort to technicalities may defeat many worth-claims, but in my claim where it seems to me the diagnosis of acute streptococcus sore throat with involvement of frontal sinuses should be service connected. The rapid sequence of occurrence of myocardial involvement and the duodenitis, which probably always precedes a duodenal ulcer, would, I believe, be taken in any medical history as a sequence and directly due to swallowing of infected material from nose and throat.

"I never had a day of sickness in my life before this, and I do not believe I have had an entirely well one since."

183 Defendant's Exhibit M is signed by Dr. Laurence W. Pence, and is dated December 8, 1933, and addressed to the Administrator, Veterans Administration, Arlington Building, Washington, D. C.

"Dear Sir: In re decision rendered by Administrator's Board of Appeals * * *"—you can read anything you want, Mr. Collins, but I will read the part that I want—or, I will read the whole business.

"This Bill of Exceptions is hereby submitted:.

"That the whole tempo of this survey and decision is that of ridicule and an attempt to belittle the claim for benefit of the above captioned claimant.

"That the findings and ratings allowed by the local rating board, based on the findings and diagnoses of the examining physicians, were not given proper credence.

"That the diagnosis in question must be presumed to have been based on the findings noted at the time of examination and must be assumed to have been sufficient at that time to justify the making of the diagnoses in question." * * *

"The claimant admits he was employed at the time of his

application, so was nearly every other officer to whom retirement pay was granted. Why bring that up? In 184 this connection claimant states that if granted 'retirement pay' his resignation from the Veterans Administration will be immediately forthcoming." * * *

"That the X-ray pictures are not diagnostic in sinus disease and should not be used if in conflict with the clinical picture. The claimant has proven this on numerous occasions. Sinuses that have been reported 'clear' by the X-ray service have been operated because of severe subjective symptoms (frontal headache) and found to be completely filled by thick pyogenic membrane and homogeneous pus. On the other hand many cases reported as 'hazy' or 'cloudy' have been found at operation to be normal.

"That the statement that a diagnosis of 'sinusitis' had never been made by Veterans' Bureau doctors is at least misleading, as this diagnosis was made by Dr. Minsky at Veterans' Bureau hospital at Waukesha, Wisconsin, and accepted * * *"

"It should be well known that a degenerative type of myocarditis is the most treacherous form of heart disease known; as long as compensation keeps up there are very fine manifest symptoms and that when decompensation does occur it is usually complete and final.

"This knowledge, it is believed, should be used in 185 evaluating a diagnosis of degeneration myocarditis."

Defendant's Exhibit G, "Veteran's Application for Pension for Disability Resulting from Service" reads as follows:

The Court: December 8, 1933?

Mr. Lytle: Yes, December 8, 1933. Reading the relevant parts:

"Have you ever been physically examined for (1) The Veterans Administration? Yes. (2) The former United States Veterans Bureau? Yes. (3) The former Pension Bureau? No."

Reading the question and answer to No. 6:

"Nature of disability on account of which disability pension is claimed: Sinusitis frontal and antri, myocarditis chronic, duodenal ulcer."

"If you received treatment while in the service, give the name, number, or location of the hospital * * * and the nature of sickness, disease, or injury. In quarters,

depot brigade, Camp Dodge, Iowa, for sinusitis acute, myocarditis acute, gastric upset, believed at the time to be from 'food poisoning.' Later diagnosed as duodenal ulcer."

"Names and addresses of all civilian physicians who have treated you for any sickness, disease, or injury since the beginning of your service:

186 "Dr. I. D. Kauffman, State Center, Iowa, Sinusitis frontal, 1919-20.

"Dr. R. F. French, Marshalltown, Iowa, Sinusitis, 1920-21.

"Dr. Burke, Mason City, Iowa, Sinusitis, 1922-23.

"Dr. Clarence De Weise, Lexington, Kentucky, Sinusitis and Myocarditis, 1918.

"Dr. G. Glickman, Veterans Administration; Wisconsin, Sinusitis, 1926."

I don't think it is necessary to read the regulations of the Veterans Bureau because there is no question about that, your Honor.

Reading from Plaintiff's Exhibit No. 13 question and answer No. 9:

"Present complaint (subjective symptoms, not diagnosis):

"Claimant states that his chief complaints are ethmoiditis and sinusitis. Says he is short of breath. His myocarditis is not so bad. Says that the dripping down in his throat caused a stomach ulcer. (That's on record in the Sioux Falls, South Dakota office. Had a G. I. series made when he was working with the Bureau.)"

Reading from Plaintiff's Exhibit 14:

"Present complaint (subjective symptoms, not diagnosis):"

187 The Court: I think you ought to let the jury know what date that is.

Mr. Lytle: That last report was dated June 3, 1929. That is about two years after the statements that are in question in this case.

The Court: And the next one is what?

Mr. Lytle: November 12, 1930. Plaintiff's Exhibit 14:

"Brief outline of claimant's disability since service:

"Disability since service: Sinusitis began during the service and has continued since. Never had hospitalization during service nor after service. Began to have trouble with stomach in 1923. Noticed first pain in epigastrium, not especially related to meals, vomiting and bloody stools.

In 1925 had G. I. series at Sioux Falls, South Dakota Veterans Bureau hospital and found duodenal ulcer. Medical treatments since. Had myocarditis first year after service; shortness of breath on mildest exertion, passed away.

"Present complaint:

"Still troubles with constant frontal headache and dripping from throat with bloody muco purulent discharge; still has pains; always present in stomach and pain in epigastrium; heavy feeling two-three hours after 188 meals; lot of belching of gas; sour eructations; no vomiting; no tarry stools; still short of breath on exertion. Blood pressure: 130-90."

Plaintiff's Exhibit No. 3, application for reinstatement, signed by Laurence W. Pence June 21, 1927. Did you read that, Mr. Collins?

Mr. Collins: Yes.

Mr. Lytle: I would like to read from it.

The Court: You may.

Mr. Lytle: Question 5: "Are you now in as good health as you were at the due date of the premium in default?"

The answer is "Yes."

"Question 7: Have you been ill, or contracted any disease, or suffered any injury, or been prevented by reason of ill health from attending your usual occupation, or consulted a physician in regard to your health since lapse of this insurance?" and the answer is "No."

"Question 11: Have you ever been treated for any disease of brain or nerves? No. Throat or lungs? No. Heart or blood vessels? No. Stomach, liver, intestines? No. Kidney or bladder? No. Genito urinary organs? No. Skin? No. Glands? No. Ear or eye? No. Bones? No."

Reading from Plaintiff's Exhibit 15, medical examination report at the United States Veterans Hospital, May 27, 1931, by Dr. Minsky. The history furnished Dr. Minsky by Laurence W. Pence reads as follows:

"Brief outline of claimant's disability since service:

"Prior to service practiced medicine making about \$7,000 or \$8,000 a year. After service returned to pre-war occupation and worked steadily up to the present time. Now is working at the National Home making \$3800 a year. Has been troubled with duodenal ulcer; appendicitis, chronic; myocarditis, sinusitis and ethmoiditis, chronic, ever since service.

"Present complaint:

"Frontal headaches, dyspnoea, weakness, loss of weight. Bloating, gnawing pain in epigastrium. History of tarry stools."

I don't recall counsel reading his exhibit from Sioux Falls, a letter, your Honor.

The Court: I think not. It was introduced.

Mr. Lytle: Exhibit 19, a letter dated December 9, 1931, at Sioux Falls, South Dakota, signed by A. R. Pearce, Regional Medical Officer, Sioux Falls, South Dakota, addressed to the Manager of the Veterans Administration, Milwaukee, Wisconsin.

"Dear Sir:

190 "Receipt is acknowledged of your communication of December 4, 1931, requesting copy of the report of physical examination, particularly an X-ray report (gastro-intestinal), taken in this case in July or August, 1924.

"Review of our records indicate that a gastro-intestinal X-ray examination was made in this case April 6, 1925, in this office. Report of this examination is quoted herewith for your information: 'G. I.—Fluoroscopic: Stomach negative. Duodenal Bulb—questionable. Suspected adhesions, hepatic flexor of colon. Plates: Colon negative. Cecum and appendix negative. Diagnosis: Suspected duodenal pathology.

"X-ray films of this examination are being forwarded herewith for your records."

Reading from Plaintiff's Exhibit No. 18 of the medical examination, complete medical examination of Lawrence W. Pence at the Veterans Administration Facility at Hines, Illinois—it is dated February 27, 1933. I am now reading from the complaints and history furnished by Dr. Pence to the examining physician and signed by Dr. Pence:

"Present complaints: Headaches quite frequently.

Complains of distressed feeling in upper part of abdomen, for seven years. States the pain comes on any time.

191 Has gas pains at night. States relief is obtained only by belching. Food and soda does not give relief.

Nausea, but no vomiting. About February 1933 had pain in abdomen, and noticed blood in stools. Was in bed for about four days."

The diagnosis is of Dr. D. S. Levy, M. D., of the Veterans Administration of the United States.

"Diagnosis: 1. Heart Disease:

A. Etiological—unknown.

B. Anatomical—Myocarditis, Chronic, Slight.

C. Physiological—Hypertension, Arterial, Slight.

D. Functional—2a Able to carry on slightly diminished physical activity.

2. Duodenal ulcer, moderate activity.

3. Constipation, chronic, moderate.

"Remarks: Gastric analysis not performed because of history of recent gastric hemorrhage. Iodeikon test not performed as symptoms are more in accord with a diagnosis of duodenal ulcer. In all probability there are adhesions between the duodenum and gall-bladder, which is responsible for non-visualization of gall-bladder."

It is signed by Dr. D. S. Levy, medical examiner.

192 Under the X-ray report made by Dr. C. G. Lyon, roentgenologist, dated February 28, 1933, it states:

"Opague meal passes the esophagus without resistance. The stomach shows no evidence of abnormality. The duodenal bulb shows persistent deformity.

"The roentgenological examination confirms the fluoroscopic findings showing a normal stomach and deformity of the duodenal bulb.

There is no five hour gastric residue.

The colon is normal. The gall-bladder is not visualized, if the patient has symptoms of Cholecystic Disease recommend further check-up of this region after an intravenous administration of iodeikon."

The electrocardiographic report is signed by Dr. Edward Hollingsworth of the Veterans Administration, Hines, Illinois.

"Clinical interpretation: Suggested myocardial degeneration.

The X-ray report of Dr. C. G. Lyon, dated April 18, 1933, states:

"Summary: Sinusitis."

Reading an addition to the report of Dr. Field dated February 27, 1933, Dr. A. Field of Hines Hospital, 193 Veterans' which Mr. Collins read for the plaintiff, I am reading an amendment to that dated April 19, 1933: "Manager, Veterans' Administration Facility, Milwaukee, Wisconsin. Attention: Chief, Out-Patient Service.

"Dear Sir: Replying to your communication of April

6, 1933 regarding Lawrence W. Pence, C-1 437 493, Dr. Field states that on reviewing the sinus films, which were taken on February 27, 1933, we find the lining membrane of the antra is slightly thickened. There is also haziness of the frontal cells attributed to an inflammatory process, which clearly indicated an active sinusitis with copious pus discharge.

"Dr. Field advises that he would suggest you change the diagnosis of February 27, 1933, to:

"Chronic Frontal and Maxillary Sinusitis with Copious Discharge."

"Enclosed is a copy of the review of the sinus films re-read under date of April 18, 1933."

194 Mr. Lytle: Dr. Glickman, take the stand.

DR. L. GRANT GLICKMAN, called as a witness herein, on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lytle.

Q. What is your full name?

A. L. Grant Glickman.

Q. Where do you live?

A. Fort Snelling, Minnesota.

Q. What is your occupation and profession?

A. Head of the Department of Roentgenology, the Veterans' Home.

Q. Your profession?

A. Physician and surgeon.

Q. Physician and surgeon, is that correct?

A. Yes, sir.

Q. How long have you been a physician and surgeon, Doctor?

A. Since 1925.

Q. What school or colleges are you a graduate of?

A. University of Illinois.

Q. Are you licensed to practice in any State?

A. State of Michigan.

195 Q. Are you employed, Doctor?

A. Yes, sir.

Q. By whom?

A. Veterans' Administration.

Q. At what place?

A. Fort Snelling, Minnesota.

Q. Minnesota?

A. Yes, sir.

Q. How long have you been there?

A. Since 1935.

Q. Where were you just before that, Doctor?

A. Milwaukee, Wisconsin.

Q. Veterans' Administration?

A. Yes, sir.

Q. How long were you at the Veterans' Administration, Milwaukee, Wisconsin?

A. 1926 to 1935—that should be 1927.

Q. Pardon?

A. 1927.

Q. Where were you prior to that, before you came to Milwaukee?

A. Leavenworth, Kansas.

Q. Veterans' Administration?

196 A. Soldiers' Home.

Q. Well—

A. National Home, National Home Service.

Q. A part of the Veterans' Administration now?

A. Yes, sir.

Q. How long were you there, Doctor?

A. September '26 to August '27.

Q. That was a branch of the Government?

A. Yes, sir.

Q. When was that, Doctor?

A. September 1926 to August 1927.

Q. You came here in August, '27?

A. Yes, sir.

Q. Doctor, did you know, during his lifetime, Dr. Lawrence W. Pence?

A. I did.

Q. Where did you first become acquainted with him?

A. Leavenworth, Kansas.

Q. Did you ever examine him, Doctor?

A. Yes, sir, I did.

Q. Strike that—well, you did examine him?

A. Yes, sir.

197 Q. I meant to ask you, do you specialize in any branch of the profession?

A. X-ray diagnosis.

Mr. Collins: Q. What was that?

A. X-ray diagnosis.

Mr. Lytle: Q. When did you first examine him, Doctor?

A. January, 1927.

Q. Doctor, do you have an independent recollection pertaining to that examination, or do you have records?

A. I have records, yes, sir.

Q. And do you have those records with you?

A. I have copies; I don't have the originals.

Q. You have copies?

A. Yes, sir.

Q. Are they copies of the originals?

A. Part is a copy of an affidavit offered in evidence to the Veterans' Administration.

Q. Well, Doctor, do you have a recollection of your examination—refresh your recollection of your examination of Dr. Lawrence W. Pence in January, 1927?

198 A. I do.

Q. And how long a period did you treat him then?

A. Approximately ten days.

Q. That was in January, all of it was in January, '27; or was part of it in February, '27?

A. January 16, 1927 to January 25th.

Q. 1927?

A. 1927.

Q. And you treated him over a period of ten days?

A. Approximately, yes, sir.

Q. And you made your first examination January 16th?

A. Yes, sir.

Q. 1927?

A. Yes, sir.

Q. And, Doctor, what did you find upon your examination of Dr. Lawrence W. Pence?

A. Dr. Pence had a bloody discharge from his nose and had severe frontal pain, pain in the frontal region, pain between the eyes.

Q. Did you come to a conclusion as to a diagnosis of his condition, then?

A. I did.

Q. What was that?

199 A. Frontal sinusitis and ethmoiditis.

Q. Did you examine any other part of his body?

A. No, sir.

Q. Just the nose, the head?

A. That was all of the complaint at that time.

- Q. Do you know what Dr. Pence's profession was?
- A. He was the eye, ear, nose and throat man at Leavenworth, Kansas, National Home.
- Q. By that you mean he was the physician and specialized in eye, ear, nose and throat?
- A. Yes, sir.
- Q. At the National Home in Wisconsin?
- A. Kansas.
- Q. I mean Kansas.
- A. Yes.
- Q. Well, Doctor, did Dr. Pence know what your findings were?
- A. He did.
- Q. How did he learn of them?
- A. He said that this was a recurrence of a chronic condition; this was an acute exacerbation.
- Q. It was an acute exacerbation?
- A. Of a chronic condition.
- 200 Q. And it was an acute exacerbation of a chronic condition which had lasted, existed previously?
- A. He had it previously.
- Q. And did he say how long previously it existed?
- A. I don't recall that he did.
- Q. Did you tell him your findings, Doctor?
- A. I did.
- Q. And he was aware of them?
- A. He was.
- The Court: Q. Did you use the term "ethmoiditis"?
- A. Yes, sir.
- Q. Would you explain that, please?
- A. A form of sinusitis.
- Q. How?
- A. It is an inflammation of one of the sinuses about the nasal, frontal nasal, maxillaries, and sphenoid.
- Q. So the term "sinusitis" would include the other more generally?
- A. It would be more general and include all four sinuses.
- Mr. Lytle: Q. Doctor, did you have occasion to examine Dr. Pence after that?
- A. I did.
- 201 Q. When did you next examine him?
- A. I examined him in Milwaukee. The date, I don't recall. He had an X-ray examination.
- Q. About what year, roughly?

A. In around '30.

Q. Somewhere around 1930?

A. 1930; somewhere around there.

Q. And what did you find then, Doctor?

A. That he had a sinusitis which involved both maxillaries and the right frontal sinus.

Q. And was Dr. Pence aware of that condition at that time?

A. He was.

Mr. Lytle: You may cross-examine.

Just one question before you go on, if I may.

The Court: All right.

Mr. Lytle: Q. Dr. Glickman, how did you come to examine Dr. Pence on January 16, 1927; that is, how did he come, how did the case come to your attention?

A. I was officer of the day, and Dr. Pence called for me and asked for me to attend him at quarters.

202 Mr. Collins: Q. You were what?

A. Officer of the day.

Mr. Lytle: Cross-examine.

Cross-Examination by Mr. Collins.

Q. Doctor, you are not an eye, ear, nose and throat specialist?

A. No, sir.

Q. At Leavenworth, Kansas, in January, 1927, in addition to Dr. Pence there was an eye, ear, nose and throat specialist on the grounds, was there not?

A. No, sir. Dr. Pence was the eye, ear, nose and throat man. He was sick that day.

Q. You mean to tell us that at Leavenworth, in January, 1927, there wasn't an eye, ear, nose and throat specialist in that Veterans' Facility except Dr. Pence?

A. That is right.

Q. You never took any courses in eye, ear, nose and throat?

A. Except those that are given in the medical school.

Q. Except those that every doctor gets generally?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

203 Q. When Dr. Pence was applying for these various disability benefits and retirement compensation, and so on, you made some affidavits for him which he was to

use with the government and which he did use with the government to try to get retirement compensation for himself?

Mr. Lytle: I object to the question, if your honor please. It has no bearing on this case whether or not he made affidavits, or what not. It is improper cross-examination.

The Court: I don't know whether it is or not, if he said something different in his examination in the affidavit, or not. It can be used for impeachment. We will allow the preliminary question.

A. I did.

Mr. Collins: Q. When you were collaborating with Dr. Pence to get disability for the doctor, you swore that you had treated Dr. Pence from the 16th of January, 1927, to the 25th of January, 1927?

Mr. Lytle: If your honor please, in the absence of any contrary statement.

The Court: Except he says so in answer to your question. Objection overruled.

204 Mr. Collins: Q. In the affidavit that you signed when Dr. Pence was applying for either compensation or disability benefits, you swore in that affidavit that Dr. Pence was treated by you from January 16, 1927 to January 25, 1927, did you not?

A. I did.

Q. And you know that either compensation or disability or retirement, which Dr. Pence applied for and for which you gave him at least one affidavit, and probably more, was denied by the government, don't you, Doctor?

A. I don't.

Mr. Lytle: Just a minute. That has nothing to do—

The Court: Objection sustained.

Mr. Collins: Q. Well, Doctor, were you and Dr. Joseph H. Plant, and Dr. C. H. Meiss, all of whom signed the affidavits for Dr. Lawrence W. Pence in his attempts to get retirement or compensation from the Government—were you ever called on the carpet by the United States Government for those affidavits?

Mr. Lytle: I object, your honor.

The Court: Objection sustained.

Mr. Collins: Q. Were you ever questioned by any
205 of your superior officers with regard to the affidavit that you signed for Dr. Lawrence W. Pence?

Mr. Lytle: I object.

The Court: On what ground?

Mr. Lytle: For the reason that whether or not he ever was questioned by his superior officers—object, if your honor please, as immaterial.

The Court: I will sustain it. You can't just say "object" and let it go at that.

Mr. Collins: Q. Doctor, do you know that any of the other doctors who signed affidavits for Lawrence W. Pence in an endeavor to assist him in getting retirement or compensation from the government, were disciplined by the United States Government for those affidavits?

The Court: Now, just a minute, Mr. Collins. You have heard me sustain objections to questions along this line, and I consider it improper conduct on your part to continue asking those questions, and you will desist from doing so.

Mr. Collins: Q. Did you know the Pences socially, down at Leavenworth?

A. I did.

206 Q. Did you ever make any written record of the treatment which you allege you gave to Dr. Pence on about January 16, 1927 and thereafter?

A. The record was made in my O. D. report during my tour of duty.

Q. I didn't get your answer.

A. I made a record during my duties as officer of the day.

Q. Pardon me. And any record of that would be kept in the hospital?

Mr. Collins: Have you those records here?

Mr. Lytle: I have no such records.

A. That was in the National Home Service.

Mr. Lytle: I have the letter from Leavenworth stating they have no records. If you would like to see that—

Mr. Collins: I asked you to produce all records of any medical treatment of Dr. Lawrence Pence while he was in the service, and I presume you have produced.

Mr. Lytle: I can't produce them.

The Court: He can't produce something he can't obtain; so, if he has got a letter showing they have no record of it, that will be sufficient to comply with it.

Mr. Collins:

Q. Isn't it a fact, Dr. Glickman, that one afternoon 207 Mrs. Pence was over to your home and that you were told by her that Dr. Pence had a cold?

A. I don't believe Mrs. Pence was ever in my home.

Q. Isn't it a fact that you gave Mrs. Pence a bottle of

cold serum to take from your home to Dr. Pence's home on or about sometime early in January, 1927?

A. No, sir.

Q. How many times do you—strike that.

(Question waived.)

Q. Where did you claim these alleged treatments of Dr. Pence took place?

A. I treated Dr. Pence on two or three occasions at the quarters in Leavenworth, Kansas.

Q. At the what?

A. Home.

Q. At his home?

A. Yes, sir.

Q. And who was present when you treated him?

A. Mrs. Pence and their daughter, Holly.

Q. On all occasions?

A. I don't know if they were both present on all the occasions.

Q. You gave him some cold serum, did you?

208 A. Some serum that the doctor was using?

Q. I say, you gave him some cold serum?

A. Yes, sir.

Q. And he had a cold; he had a cold?

A. No, sir.

Q. Then, you didn't see him daily between January 16, 1927 and January 25, 1927, did you?

A. It wasn't necessary for the medical treatment that I see him daily.

Q. Well I say, you didn't see him daily, did you?

A. No, sir.

Q. Now, what is the greatest number of times you claim you saw him in those ten days?

A. On three occasions; three.

Q. And when was the last time you claim you saw him?

A. Oh, approximately the 25th of January, 1927.

Q. Isn't it a fact that you and Mrs. Glickman went over to the Pence's home on a few occasions in January of 1927?

A. Not that I recall.

Q. Isn't it a fact that Mr. and Mrs. Lawrence W. Pence called socially at your home in January of 1927?

A. I don't recall.

209 Q. Isn't it a fact that the only thing you did was to give Dr. Pence a little cold serum when he had a cold, or when you and Mrs. Glickman called over one night.

A. No, sir. I gave him some argyrol packs, in addition to the cold serum.

Mr. Lytle: I—

The Court: The answer may stand.

Mr. Collins: Q. You have been with the government since 19—what?

A. September 26, 1926.

Q. And all the time you have worked for the government you have been in what capacity?

A. I have been in X-ray diagnosis.

Q. And you don't take the X-rays yourself?

A. I supervise the taking of the X-rays; they are taken under my direction.

Q. And you interpret the X-rays, do you not?

A. Yes, sir.

Q. Did you make an X-ray of Dr. Lawrence W. Pence on the complaint of sinusitis sometime on or about October 10, 1928, in the Milwaukee Home?

A. I probably did. I was the roengenologist at that 210 time. I would have to refer to the record.

Q. I call your attention to—strike that.

(Question waived.)

Q. You made all the X-ray examinations at the National Home in Milwaukee in the year 1928, didn't you?

A. With the exception of those periods on which I was on leave of absence.

Q. And you remember that you did make, and the records show that you did make, X-rays of Dr. Lawrence W. Pence?

A. If I was on duty, I did.

Q. What is Dr. Edward R. Ryan; what is he?

A. He was down at the Veterans' Administration in the downtown office in Milwaukee. We were a separate unit outside at Wood, Wisconsin. I had no—I don't know Dr. Ryan. If they were taken at the Milwaukee office it wasn't under my supervision; that was under the Veterans' Bureau.

Q. Is Dr. Ryan an eye, ear, nose and throat man?

A. I don't know Dr. Ryan.

Q. You don't know him at all?

A. No, sir.

Q. In this Plaintiff's Exhibit 10, dated at Milwaukee, 10-10-28, on the second page: "X-ray shows all sinuses clear"?

211. A. That wasn't taken at our office; that was taken at the Veterans' Bureau.

Q. Well, did you ever take an X-ray of Dr. Pence?

A. To my recollection, we took X-rays of his sinuses in and about 1930.

Q. And do you remember what they showed?

A. I believe he had a maxillary sinusitis on both sides, and a right frontal sinus involved, if I recall.

Q. Will you explain the difference to us between a frontal sinus and a maxillary sinus?

A. There are various sinuses which are found about the nasal space. You have the frontal sinus, which is present up above the ethmoids, which are present between the orbits, and the maxillary is here (indicating).

Q. Just a moment. You indicate the frontal?

A. Not up that high.

Q. At the bridge of the nose?

A. At the bridge of the nose. The maxillary is on either side of the cheeks. The sphenoid is posteriorly in the skull beneath the pituitary body.

Q. Didn't you take an X-ray of Dr. Pence on or about November 14, 1930?

212. A. I wouldn't know the exact date.

Q. Do you recall that you did make one?

A. Yes, I believe I do. I believe it was in May of 1930.

Q. And then, these government reports, you interpreted those X-rays of Dr. Pence?

A. Those were taken at our offices. There were two offices in Milwaukee; one out at Wood, Wisconsin, or then the National Home, and one downtown on Second Street in Milwaukee.

Q. In this report of Plaintiff's Exhibit 14, which is dated at the National Home 11-12-30, on the second page of that report, it reads: "Examination of accessory nasal sinuses reveals them as being normal," signed "Dr. Glickman." Was that you?

A. That is me.

Q. Did you make that report?

A. I did.

Q. And you made it as an officer and a correct report?

A. That is the only reports I make.

Q. I didn't ask you that. I asked you if you didn't try to make a correct report?

A. Those are the only ones I make.

The Court: Well—

A. Well, correct report is the answer; yes.

213 The Court: We will take a recess now for fifteen minutes.

(Whereupon a short recess was taken.)

After Recess.

DR. L. GRANT GLICKMAN; resumed the stand as a witness herein, on behalf of the defendant, was examined and testified further as follows:

Cross-Examination (Cont'd) by Mr. Collins.

Q. You have been now with the government for about 14 years?

A. Yes, sir.

Q. You finished medical school in 1925?

A. 1924. I finished my internship in 1925.

Q. Did you ever practice as a private physician?

A. Yes, sir.

Q. Where?

A. Norway, Michigan.

Q. For how long?

A. For several months.

Q. And then you went into the government service, is that right?

A. No, sir.

Q. Where did you go then?

214 A. I went to the Gogebic County Sanitarium where I did X-ray work at Bessemer, Michigan.

Q. Since 1926 you have been with the government as a roentgenologist?

A. Yes, sir.

Q. Since you went in the government service, how many people have you ever treated for sinusitis?

A. I couldn't say.

Q. Well, about how many?

A. I couldn't estimate the number. I substituted for Dr. Pence when Dr. Pence was on leave, at Milwaukee, and I took care of the eye, ear, nose and throat department, and I treated patients there.

Q. At the time you claim you treated Dr. Pence you were in Kansas, were you not?

A. Yes, sir.

Q. Have you ever been admitted as a doctor of medicine in Kansas?

A. It was—

Q. I am asking whether you have ever been admitted to practice in Kansas as a doctor in medicine and surgery?

A. I didn't practice in Kansas.

Q. Did you make any charge to Dr. Lawrence W. Pence for the treatments you claim to have made?

A. It was my official duty to treat Dr. Pence, and I made no charge.

Mr. Collins: If the court please, at the time the witness says he treated Dr. Pence he was in the State of Kansas and he wasn't licensed to practice there.

The Court: He was on a government reservation.

Q. The National Home, that was United States property, wasn't it?

A. It requires that you be registered and licensed in one of the States of the Union.

Mr. Collins: Q. Were all of these treatments on the government reservation?

A. Yes, sir; that is where Dr. Pence lived.

Q. Do you recall, Dr. Glickman, how many affidavits you made for Dr. Pence in the course of his various applications?

A. I made one. We were stationed at the National Home in Wisconsin.

Q. You say there was no eye, ear, nose and throat man at Leavenworth, Kansas, except Dr. Pence. Now, was there a city consultant at any place off the reservation?

A. Yes, sir; there was a consultant from the town of Leavenworth.

Q. And how far was the town of Leavenworth from the hospital there on the grounds?

A. About three miles northwest.

Q. And in any case, that was at all severe, in the absence or sickness of the regular eye, ear, nose and throat man you would call in this consultant?

A. No, sir.

Mr. Lytle: Object as incompetent, irrelevant and immaterial.

A. No, sir. The medical officer in charge would designate another physician to substitute for Dr. Pence.

The Court: He may answer.

Mr. Collins: Q. Were you designated by anybody and, if so, by whom?

A. On what dates?

Q. The dates you have testified to here, January 16, 1927; three times between that and January 25th?

Mr. Lytle: Object to that as immaterial whether he was designated. The fact remains that he examined him.

The Court: He may answer.

A. As officer of the day I was called upon to treat—or to call upon Dr. Pence and offer any treatment as was indicated; and, as I saw the patient, I was to continue such 217 treatment until the treatment was completed.

Mr. Collins: That is all.

Redirect Examination by Mr. Lytle.

Q. Dr. Glickman, I hand you Defendant's Exhibit, for identification, "Q", and ask you if your signature appears thereon?

A. It does.

Q. What is Defendant's Exhibit Q, Doctor?

A. It is headed: "Physician's Affidavit."

Q. What is that and why was—who made it out and why?

A. It evidently is a form of the Veterans' Bureau, executed by me, the United States Veterans' Bureau, on Form 2560.

Q. It is an affidavit?

A. Yes, sir.

Q. And sworn to by you?

A. Yes, sir.

Q. Will you read that, please, Doctor?

A. "Physician's Affidavit. Note: This statement should be executed by the physician who first attended the claimant after his discharge from service.

"In the compensation Claim No. C-F, Lawrence W. Pence (name of claimant), personally appeared Dr. L. 218 Grant Glickman, of the National Home, Wisconsin, who being duly sworn states: I am a practicing physician in the State of Michigan; that after his discharge from the military service on January 9, 1919, I first examined the claimant on January 16, 1927. His complaint at that time was frontal sinusitis and ethmoiditis, chronic.

"Upon physical examination I found the following symptoms present: headache, severe; bloody purulent discharge from nose.

"I diagnosed injury or disease as chronic ethmoiditis and frontal sinusitis, with acute exacerbation.

"The prognosis was fair but incurable.

"I do believe the claimant's disability is attributable to his military service for the following reason: Statement of claimant that above trouble followed influenza in service. Never troubled before that time with above disabilities."

There is a pencil mark on here; it is not in my writing.

The Court: Well, don't mind reading that, then.

Mr. Lytle: Q. Just read your own.

A. On the reverse side, new paragraph: "Claimant continued under my care until January 25, 1927, during which time I treated him as follows: Argyrol installations and packs; serum therapy.

"Remarks:" — it carries no remarks. And then my signature, "L. Grant Glickman." It says: "Subscribed before a notary of the State of Wisconsin, County of Milwaukee, 7th day of September, 1928." The signature looks like "Fisk," but I can't make it out.

Mr. Lytle: That is all.

Recross Examination by Mr. Collins.

Q. This is in your handwriting, is it not?

A. Yes, sir.

Mr. Collins: That is all.

The Court: That is all, Doctor.

Mr. Lytle: Defendant offers in evidence, Defendant's Exhibit Q.

The Court: Received.

(Said DEFENDANT'S EXHIBIT Q, so offered, was thereupon received in evidence.)

Mr. Lytle: I am trying to find out whether to let the doctor go. You won't need the doctor?

Mr. Collins: No.

The Court: All right.

220 (Witness excused.)

Mr. Lytle: Dr. French.

DR. ROYAL F. FRENCH, called as a witness herein, on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lytle.

Q. You are Roy French?

A. Yes, sir.

Q. You are a physician and surgeon?

A. Yes, sir.

Q. And where do you live?

A. Marshalltown, Iowa.

Q. How long have you lived there, Doctor?

A. Since 1909.

Q. And what schools or colleges are you a graduate of?

A. State University of Iowa.

Q. Doctor, when did you graduate?

A. I graduated in liberal arts in '06, and medicine in 1909.

Q. And have you been practicing in Iowa?

A. Ever since.

Q. And you are licensed to practice medicine?

221 A. Yes, sir.

Q. Doctor, is your practice—do you specialize, or is it general?

A. I specialize in eye, ear, nose and throat.

J. In eye, ear, nose and throat?

A. Yes, sir.

Q. Doctor, were you ever acquainted with one Dr. Lawrence W. Pence?

A. Yes, sir.

Q. Approximately when and where, Doctor?

A. From approximately 1911 or '12 until 1925 or '29; I am not just sure.

Q. You were acquainted with him, of course, then, in 1919?

A. Yes, sir.

Q. Doctor, where did—did you know Dr. Pence in 1919?

A. At State Center, Iowa. He was practicing at State Center.

Q. Private practice?

A. He might possibly have been at Laurel. I first

knew him when he was practicing at Laurel, a small town south of Marshalltown; and then he moved to State Center.

Q. Was this after he came out of the service?

A. No, this was before he went into the army.

222 Q. Where did you know him after he came out of the army?

A. At State Center, Iowa.

Q. Was he practicing there?

A. Yes, sir.

Q. Was he in general practice, or specializing?

A. I think he was doing some general practice, but confining himself also to eye, ear, nose and throat.

Q. The same as you are, a specialist?

A. Yes, sir.

Q. Doctor, did you ever examine him yourself?

A. Yes, sir.

Q. When?

A. Well, as I remember it, in 1919.

Q. And, Doctor, tell the jury what complaints Dr. Pence made to you and what your findings were?

A. At that time I treated him for an infection in his sinus.

Mr. Collins: If the court please, I object to this testimony as immaterial. The period elapsed was February, 1920, and the time for reinstatement was July 1, 1927. What went on before that period, I think, is immaterial in this issue.

The Court: Well, I think not. We will take the doctor's testimony.

223 Now, as I recall the questions in the application, while there is one of them as to whether your health was as good as when the policy lapsed, there is also one "whether you have been examined by a doctor." There is no limitation of that kind on it. Am I correct on that?

Mr. Collins: Isn't that during the period of lapse? I don't know.

The Court: Well, let us examine the paragraph. My recollection is that Question 7: "Have you been ill or contracted any diseases or suffered any injury or been prevented by reason of ill health from attending your usual occupation or consulted a physician in regard to your health since the lapse of this insurance?" You are correct, Mr. Collins.

Mr. Lytle: Isn't there another question, your honor?

The Court: One other: "Have you ever been treated for any disease?"

Mr. Lytle: That is my contention. There is no limitation on that.

The Court: Let me ask the doctor a preliminary question:

Q. Considering the question asked, "Have you ever been treated for a disease of brain or nerves, throat or lungs, heart or blood vessels, stomach, liver, intestines, 224 kidney or bladder, genito-urinary organs, skin, glands, ear or eye, bones," are any of those—would a treatment for sinusitis come under any of those?

A. Yes, sir; it would affect the throat.

Q. Sinusitis would affect the throat?

A. Yes, sir.

The Court: You may answer.

Mr. Lytle: Q. When was that, Doctor?

A. In about 1919.

The Court: Q. You say "about 1919." Do you know for certain it was after he came back from the service?

A. Yes, sir. It was after he came back from the service.

Mr. Lytle: Q. Doctor, do you have an independent recollection of what your findings were?

A. He had an infection in his frontal sinus.

Q. Do you have any recollection as to discharge or blood, and so forth?

A. Yes, sir. He had an acute infection, and that usually has a discharge of purulent and serous matter, and 225 sometimes it is streaked with blood.

Q. Do you remember what his symptoms were, what he complained of?

A. Well, I don't remember definitely, but he usually complained of headaches.

The Court: Never mind that.

Mr. Collins: I move that the answer be stricken.

The Court: Well, so far as he knew is all right, but the rest of the answer may be stricken.

Mr. Lytle: Q. Dr. French, I hand Defendant's Exhibit "R" for the purpose of refreshing your recollection, and you refer to that exhibit, Doctor, and refresh your recollection.

The Court: In the first place, what is it?

Mr. Lytle: Defendant's Exhibit "R" is a statement dated September 9, 1929, signed by Dr. French as to his

examination and what he found. I was going to have him testify to that.

Q. Have you refreshed your recollection, Doctor?

A. Yes, sir.

Q. Doctor, after having refreshed your recollection from Defendant's Exhibit "R", will you please state what your findings were—strike that.

(Question waived.)

226 Q. Will you please state what symptoms Dr. Pence was complaining with at that time?

A. Complaining of symptoms of frontal headache. He had a purulent discharge. There was some blood in it. He also complained of mental depression, which usually follows with any cold or sinus infection.

Mr. Lytle: You may cross-examine.

Mr. Collins: No cross-examination.

The Court: All right, Doctor, you are excused.

Mr. Lytle: Mr. Collins, will you need Dr. French? He lives in Iowa.

Mr. Collins: No, I won't need him.

(Witness excused.)

Mr. Lytle: Dr. Burke, take the stand, please.

DR. T. A. BURKE, called as as a witness herein, on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lytle.

Q. Your full name is?

A. T. A. Burke.

Q. You are a physician and surgeon?

227 A. Yes, sir.

Q. Doctor, where do you live?

A. Mason City, Iowa.

Q. How long have you been a physician and surgeon, Doctor?

A. 1909.

Q. What school or college are you a graduate of?

A. Loyola, in Chicago.

Q. In Chicago?

A. Loyola University.

Q. How long have you been practicing in Iowa, Doctor?

A. Since 1910.

Q. And you are licensed to practice just in Iowa?

A. In Iowa and Illinois.

Q. In Iowa and Illinois. Doctor, have you specialized in any branch of the profession?

A. General surgery.

Q. General surgery?

A. Yes, sir.

Q. You say you practice in Mason City, Iowa, most of the time?

A. Yes, sir; since 1919.

Q. Doctor, were you ever acquainted with one Dr. Lawrence W. Pence?

228 A. Yes, sir.

Q. And where and when did you know him, Doctor?

A. He was practicing at Fertile, Iowa; that is about 15 miles from Mason City.

Q. Fertile, Iowa?

A. Yes, sir.

Q. And was he in general practice or specializing?

A. Well, he was in general practice. I don't know particularly whether he was specializing—probably he was, too—but I did his surgery for him.

Q. Did you send him any kind of work?

A. No, sir.

Q. Do you know whether or not he was a specialist in any branch of medicine?

A. Yes, I knew he made a specialty of eye, ear, nose and throat.

Q. Doctor, were you ever in professional contact with him pertaining to any disease or injuries that he may have had?

A. That he had?

Q. Yes.

A. Well, I discussed his sickness with him at different times at the hospital.

Q. Well, state what you mean by "sickness."

229 A. Well, sometimes he complained about having sinus trouble, chronic sinus trouble, and headache, and his work out there he thought was pretty hard.

Q. And when was this, Doctor?

A. That is 1922, '23.

Q. 1922 and '23?

A. Yes, sir.

Q. And what did he tell you regarding his sinus condition?

A. Well, he said he wanted to get out of this practice because it was too hard being up nights and making calls, and all that; and the reason he wanted to get out of it was because he had headaches and he had considerable trouble with his sinuses.

Q. You didn't examine him yourself, of course?

A. No, I never made an examination of him.

Q. And you say he wanted to get out of private practice?

A. Well, he felt he wanted to get out where he wouldn't be getting out nights and working—yes, he wanted to get out of private practice. He gave me that reason for leaving. He was going into the government service if he could.

Q. Well, did he say why he wanted to get out of going out at nights?

A. Well, because it was too hard, and he had too many headaches.

230 Q. You mean he told you that the hard work—

A. Being out nights. You see, a country practice is a pretty tough practice for anybody, and you get out any time, of course; any kind of weather, and that is pretty bad weather. We had bad roads out there in that country in '22 and '23.

Q. And did he seem to think it would be easier on him physically if he got—

Mr. Collins: I object to counsel leading the witness.

The Court: Objection sustained.

Mr. Collins: Q. Doctor, you wouldn't care to go into a country practice on roads like that, would you?

A. No, sir.

Mr. Lytle: Object as immaterial.

The Court: Overruled.

Q. Doctor, I want to ask you a question. In answer to the question, "Have you ever been treated for the disease of throat or lungs," would you think a treatment for sinusitis would come in that classification?

A. Well, a treatment for throat—it would have to be secondary.

Q. Primarily, you wouldn't regard the treatment of sinusitis as a treatment of throat or lungs, would you?

231 A. No, sir.

The Court: That is all.

Mr. Collins: That is all unless counsel has something further.

The Court: That is all.

Mr. Lytle: This doctor may be excused?

Mr. Collins: Yes.

(Witness excused.)

Mr. Lytle: Dr. Hollingsworth, take the stand.

DR. EDWARD W. HOLLINGSWORTH, called as a witness herein, on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lytle.

Q. Your full name, please?

A. Hollingsworth, Edward W.

Q. You are a physician and surgeon?

A. I am a physician.

Q. Physician?

A. Yes, sir.

Q. Where do you live, Doctor?

A. 223 South East Avenue, Oak Park, Illinois.

232 Q. How long have you been a physician, Doctor?

A. Since 1918.

Q. What schools and colleges are you a graduate of?

A. University of Virginia.

Q. And in what States are you licensed to practice medicine?

A. New York and Illinois.

Q. Are you employed, Doctor?

A. I am.

Q. By whom?

A. By the Veterans' Administration.

Q. At what place?

A. Hines, Illinois.

Q. Have you specialized in any branch of the profession?

A. I have.

Q. And how long have you—what is that? What branch?

A. Antero-cardiovascular disease.

Q. Coronary vascular?

A. Cardiovascular.

Q. Doctor, will you tell the jury just in simple terms what that means?

A. Disease of the heart and blood vessels, circulation.

Q. How long have you been specializing in heart disease, Doctor?

233 A. About 16 or 17 years.

Q. And have you been so specializing in the course of your employment with the Veterans' Administration?

A. I have.

Q. And how long have you been specializing in heart disease with the Veterans' Administration?

A. 16 or 17 years.

Q. Doctor, tell the jury what coronary thrombosis is, please.

A. Coronary thrombosis is the formation of a thrombosis, or blood clot, in one of the coronary arteries which carry the blood supply to the heart muscle.

A. And what is a thrombosis, Doctor; coronary thrombosis? It is a clot, you say?

A. That is correct.

Q. And what effect does that clot have on a person?

A. Well, that clot shuts off the circulation from the rest of that vessel so that the area of muscle which is ordinarily normally supplied by it, doesn't get blood, at least from that vessel. The blood supply may be entirely shut off, or it may be taken up over part of that area from other arteries. The part which is not supplied will degenerate and eventually form a scar, fibrous tissue, in that portion of the heart muscle which is not adequately supplied with blood.

234 Q. And, Doctor, tell the jury what is myocarditis.

A. Myocarditis is a somewhat indefinite term. Properly used, it is now confined to conditions which indicate an infection in the heart muscle.

Q. Now, in what way, if any, can myocarditis—what condition can it have with thrombosis, coronary thrombosis?

A. That predisposes, or precipitates, a thrombosis.

Q. Doctor, now are you familiar with sinusitis, the term?

A. Yes, I am familiar with the diagnosis.

Q. Do you know whether sinusitis is an infectious disease?

A. It is an infection.

Q. An infection. And can poison from that infection get into the blood stream?

A. It can.

Q. And can it have any connection with myocarditis?

A. It can.

Q. In what way?

A. It can cause it, or it can aggravate it.

Q. It can cause it—myocarditis—or aggravate it?

A. Correct.

Q. And what is meant by acute exacerbations of
235 chronic sinusitis, of nasal accessory sinuses?

A. Well, one might have a chronic sinusitis with more or less indefinite symptoms, such as headache; and when there is an acute exacerbation the headache becomes worse, or there may be a profuse discharge from the sinuses, or pus, or purulent matter, or there may be fever and the general signs which come from fever or sepsis.

Q. Doctor, referring again to the heart muscle, condition of the myocarditis, can chronic myocarditis—can that exist over a period of years?

A. It can.

Q. In what degrees can it exist over a period of years, Doctor, and how long?

A. Well, in its general meaning it could exist over an indefinite period of years.

Q. Can it exist mild or moderate, exist over 5, 10, 15 years, myocarditis?

A. I think so.

Q. And what is myocraditis in compensation and decompensation?

A. Well, decompensation refers to symptoms which are caused by inadequate heart function. Now, in general, they would be pain or shortness of breath, or swelling. Those are symptoms.

236 Q. When it has compensation, what is the condition then?

A. It means that you are free, or relatively free, from those symptoms under the conditions under which you are living.

Q. Doctor, so that to see if I understand right, and the jury can too, when there is compensation does that mean the other muscles are compensating for the weakness in other muscles?

A. No. That means that the condition is not so serious that the heart can't carry on the circulation satisfactorily.

Q. Do persons have myocarditis and engage in ordinary, moderate activity, Doctor?

A. Yes, sir.

Q. And a person with mild or moderate myocarditis, can they practice medicine?

A. Yes, they might practice medicine.

Q. Well, go ahead.

A. When I answered the term as to what the meaning of myocarditis was I merely said that the restricted meaning was an inflammation of the heart muscle; but a few years ago the term was used to include any disease of the heart muscle, and that has been the usual use and significance of the term.

The Court: Q. So that ordinarily it would be used in the latter interpretation rather than in the restricted interpretation?

A. Yes, sir.

Mr. Lytle: Q. Doctor, could a physician employed in the Veterans' Administration carry on with myocarditis?

Mr. Collins: Just a minute. Object to that as not a proper question.

Mr. Lytle: Well, I am asking this witness who is qualified. It is wholly within the province. He is such a physician. He has personal knowledge of the condition in which I asked; and this doctor, there is no better person in the world to testify as to whether or not a man can function at a Veterans' Bureau.

Mr. Collins: I am not objecting to the qualifications, but I am objecting to the form of the question.

The Court: Objection overruled. The witness may answer.

(Pending question read by reporter.)

A. He could.

Mr. Lytle: Q. And what physical activities could he engage in with mild myocarditis?

A. It would depend upon the symptoms which he might have, if any.

238 Q. Would it be possible to have a mild myocarditis and not exhibit these symptoms?

A. Yes.

Q. Pardon?

A. Yes, he might not have any, and he might engage in any ordinary activity.

Mr. Lytle: Cross-examine. Just a second.

Q. Doctor, what are electrocardiograms?

A. Electrocardiograms are a graphing of the electrical events which occur in the heart with the heart's action.

They are taken by means of an instrument known as the electrocardiograph, and a camera.

Q. And, Doctor, what functions do they supply in connection with heart ailments?

A. They show us any abnormality of this electrical impulse which occurs, and they are particularly valuable in certain forms of heart disease, especially those which we would call degenerative heart disease, those which we find in older individuals from 40 years and up, chiefly.

Q. What is meant, Doctor, by suggested myocardial degeneration?

A. Well, suggested myocardial degeneration would be a term used in reference to an electrocardiogram which showed some departure from the normal, suggesting disease of the heart muscle.

Mr. Lytle: Cross-examine.

The Court: Let me ask a question.

Q. A man over 40, would it be quite customary, or quite ordinary, to find some deviation just on account of age alone?

A. No, sir, not unless there was some abnormality in the heart.

Q. When you said "normal" you referred to normal people over 40 years of age, rather than comparing them with the younger people, is that it?

A. Yes, sir, although there is no change in the electrocardiogram over a period of years in normal individuals. They have been proposed as a means of identification, are so fixed in their type.

Q. Just the matter of growing old wouldn't be reflected on a cardiogram, if they were taken in periods of, say, five years apart over a period of 10 or 15 years?

A. 10 or 15 might, but I think in the end that would have to be interpreted that the individual's heart had grown old, that there was actual change there.

240

Cross-Examination by Mr. Collins.

Q. I show you a sheet from Plaintiff's Exhibit No. 18, being a sheet that occurs on Page 5 in sequence, and ask you, Dr. Hollingsworth, if this is what you call a cardiogram?

A. It is an electrocardiogram.

Q. And this was made by you, was it, Doctor?

A. I don't think it was made by me. I don't take many of them. It was interpreted by me.

Q. It was made in the hospital there and interpreted?

A. Yes.

Q. Would you interpret it now for the court and the jury?

A. Do you mean without regard to this (indicating)?

Q. Yes, just use your cardiogram.

A. Well, the R lead—this upstroke is the R lead in I—is somewhat lower than usual. The R lead is also lower in II than usual. We have, you might say, an inverted QRS, that is, a considerable S in lead I, which would mean a moderate left axis deviation. That may come with a heavy-set individual, or due to hypertension or aortic disease. There is also a slight slurring of the QRS in each lead, which isn't very significant. The T in I is low, and there is also leeway in lead I. The T in II and III are normal.

241 Q. Did you write this, or cause this to be written, here in your interpretation, "possible myocarditis"?

A. No, sir. That is put on the request when it comes up.

Q. Well, would you say from this graph or cardiogram that you would be sure that the one whose heart is here represented in movement had myocarditis?

A. I would be quite suspicious; I would not be sure.

Q. And the date of this is shown to be 2-27-33, is it not?

A. That is correct.

Q. Did you personally—you personally didn't make any physical examination of Dr. Pence while he was down there?

A. I have no recollection of any.

Q. And you made no part of this report, then?

A. I made this report.

Q. Up above?

A. Yes, sir.

Q. Well, let us see what that report says. Would you explain it as you go along, Doctor, please?

A. Rhythm is normal—meaning that the heart contracts regularly and that the impulse starts in the normal place. The rate is 86, which is self-explanatory. P. R. interval .16 of a second, which is normal. That is the period which

242 it takes the electric impulse to pass from the small chamber, or respiratory part of the heart, to the large chamber, or pump. P upright in all leads, normal height and appearance. The P is what comes with the passage of this electric impulse through this small chamber of the

heart. QRS is slightly slurred in all, diphasic in II and III, not greater than 6 millimeters, if any.

Q. I would like to know just exactly what QRS is.

A. I am going to tell you. The QRS is the passage of this electric impulse through the large heart chamber, or pump part, known as the ventricle. It shows the time that it takes for the spread of this impulse through the ventricle. The upper limit of this is .12 of a second. In this particular case it is less than that. When I say it is "slurred," I mean that the up and down stroke, which represents the movement of a string, of the string's shadow on the bromide paper, doesn't occur as quickly as usual. It is sort of sloppy or sluggish.

Q. Now, you say "diphasic in II and III"?

A. That means it goes below the base line as well as above. Normally, they should all be above. "Not greater than 6 millimeters, if any." We normally accepted 7 millimeters as a lower limit of normal. Now that represents a certain amount of electric current. We so regulate this 243 string shadow that when we throw in a millivolt of current we get a deflection of one centimeter, so that here we get a deflection of 6 millimeters, so—we know that there is .6 of a millivolt of electricity being let off from this particular patient's heart so that 6 millimeters, we would say, would be at least the lower limit of normal, according to that.

"T upright in all leads, normal height and appearance." As I just said, I would consider the T one low.

"Suggested myocardial degeneration" was the diagnosis made here, and obviously based on a slurring of the QRS and the fact that QRS is diphasic in leads II and III.

The Court: Q. Doctor, by "leads" you mean this instrument you fasten to the different lines in the arm and leg and one over the heart, and those are called different leads?

A. We fasten it to the two wrists and the left ankle. The first lead is taken between the two hands, the second between the right hand and the ankle, the third between the left hand and the ankle; and what the electrocardiogram does is to measure the different electric potentialities between those two points.

Mr. Collins: Q. In your judgment, Doctor, from what you observed in this cardiogram and your clinical interpretation of it, myocardial degeneration was not absolutely positive or certain, was it?

A. No, that is correct. I said "suggested."

Q. And with this cardiogram in mind, what would you say about the existence of any myocardial degeneration, if present, as to the length of time in this particular patient it might have existed?

A. I don't think there is anything in such an electrocardiogram indicating the indication. It might be a month, it might be 20 years, as far as that would show you. It just shows it is there.

Q. I see. Then, from this we couldn't get—you couldn't even make an estimate as to whether it was beginning then or whether it had existed for some time?

A. Well, you would form some opinion in that this electrocardiogram is what we usually get when we find degenerative heart disease, and that is usually a thing of long standing and it is a slow process. Other than that, there would be no indication there.

Q. Did I understand you to say that myocarditis is, in itself, was not a disease, but it was simply a manifestation of something wrong with some other part of the body that was throwing an extra load upon the heart and causing it to break down?

A. No, sir, I didn't say that.

Q. What did you say?

A. I said myocarditis was formerly a general term used to include any form of disease of the muscle of the heart.

Q. What is its present use?

A. Well, I stated that also. Its present use means an actual inflammation of the heart muscle. That is more restricted, of course, and also more recent.

Q. It is a very general and vague term in medicine. Formerly, wasn't the meaning heart muscle damage?

A. I wouldn't say it was vague, as much as inclusive.

Q. It might come from intestinal trouble, might it not?

A. I would say not.

Q. It might come from infected teeth, might it not?

A. Oh, yes, I think that is possible.

Q. It might come from any general infection in the system anywhere?

A. Any severe, long-continued infection could cause it.

Mr. Collins: That is all.

Mr. Lytle: That is all, Doctor. You say he may go?

Mr. Collins: Yes.

(Witness excused.)

246 Mr. Lytle: Your honor, I have another witness but I am afraid—you said you wanted to adjourn.

The Court: Well, we have got another case scheduled for ten o'clock tomorrow; so you had better put on your next witness and we will adjourn after that.

Mr. Lytle: Mr. Posey.

RICHARD B. POSEY, called as a witness herein, on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lytle.

Q. What is your full name?

A. Richard B. Posey.

Q. Where do you live, Mr. Posey?

A. I reside in Washington, D. C.

Q. How long have you lived there?

A. Well, I lived there when I was a boy, but I moved away from there and went to Indiana, and recent years I have lived there since June 10, 1918.

Q. What is your occupation, Mr. Posey?

A. I am employed in the United States Veterans' Administration.

Q. What division, department?

247 A. I am a technical adviser in insurance for the Bureau. My office is in the Insurance and Service Department.

Q. Insurance Service. Is that also known as the Insurance Division?

A. Well, it was Insurance Division back in the earlier days, but they have changed it.

Q. Well, it is called Insurance Service?

A. It is called Insurance Service.

Q. How long have you been employed in the Insurance Service, Mr. Posey?

A. Well, since I went with the Bureau I have been with the War Risk Insurance, that was on June 10, 1918, and that later became the Veterans' Bureau, and now the Veterans' Administration.

Q. And have you been employed—strike that.

(Question waived.)

Q. Are you familiar with the procedure of the Insurance Service in the Veterans' Administration pertaining to applications for insurance and applications for reinstatement and conversion, and what not?

A. Yes, very familiar with it. I have been right in it all the while.

Q. I see. In 1927, Mr. Posey, what was the procedure in connection with passing, approving applications for reinstatement of insurance applications which had previously lapsed?

A. Well, the applications would come in. If they had the money with it for the premium, the application and medical examination would go through, be checked, and we would number the application.

Q. What information would you have before you passed upon whether the risk should be accepted?

A. You would have a medical examination. If it was a good health case, it had to show a clinical bill of health. In other words, all the replies had to be indicative that the man was a good risk, in good health I should say. I interpolate there because good health and good risk are two different terms from our standpoint. A man may be in perfectly good health but he wouldn't be a good risk with the average life insurance company if he was a flyer, or something of that sort.

Q. What do you mean? Why would he be in good health but a poor risk?

The Court: Well, he gave an illustration of a man in aviation might be in good health but a poor risk.

A. Occupational hazard.

249 Mr. Lytle:

Q. I mean on account of what condition—all right. (Question waived.)

Q. Do you know the purpose of questions 5, 7 and 11 of the application of reinstatement?

Mr. Collins: Just a minute. I object to that. It is so plain it doesn't need interpretation by any expert.

The Court: Reframe your question.

Mr. Lytle: Strike that question.

Q. Mr. Posey, hand your Defendant's—or Plaintiff's Exhibit No. 3, and ask you if you are familiar with that form.

A. Yes, I am familiar with it. I helped draft it.

Q. It is known as Form 742, Revised December 1924. Is it not?

A. Yes.

Q. That is what it says. Well, now, Mr. Posey, tell the jury the purpose, if any, of questions 5, 7 and 11 incorporated in that application.

Mr. Collins: We will object to the question for the same reason, that the questions speak for themselves.

The Court: Well, the Government alleges fraud in this in making answer.

Mr. Collins: All right.

The Court: The reliance of the Government upon 250 the questions and answers, which is essential in fraud.

A. The first question, No. 5, "Are you now in as good health as you were at the due date of the premium in default?" is purely for where a man has come in a short period of time, who would come in within three months, and if they made that statement, and they answered a few questions on this page here, they wouldn't have to have a full medical examination.

Mr. Lytle:

Q. Yes. Go ahead.

A. (Continuing.) But we had a large number of these printed and we had included that question. Question 7—

Q. (Interposing.) Read the question.

A. "Have you been ill, or contracted any disease or suffered any injury, or been prevented by reason of ill health from attending your usual occupation, or consulted a physician in regard to your health since lapse of this insurance? (Answer yes or no.)" The answer is "No."

"If so, give dates and full particulars including the name and address of physicians." The purpose of that question is to ascertain whether he received any treatment or not. If he received treatment, and given the name of a physician, we would write the physician and find out just exactly what the treatment was.

251 Q. In other words, the Bureau would make an investigation, is that right?

A. That is just exactly right.

Q. All right, proceed with No. 11.

A. Well, I would like to go a little further on this if I can.

Q. Go ahead.

A. We had a large number of applications coming in at that time. It was utterly impossible—

Q. (Interposing.) You mean in 1927?

A. In 1927. We had something like 300,000 in about a month and a half there, and it was entirely too many to make much investigation on, and if these answers were all regular they were put through immediately as fast as

we could. In this particular case I recall the actual policy wasn't issued until August, and yet that application came in there sometime in July. You see, we had a tremendous lot of them.

Question 11 is on the reverse side of the outward side of the first half of the sheet here. "Have you ever been treated for any disease of brain or nerves?" The answer is "No."

"Throat or lungs?" The answer is "No."

"Heart or blood vessels?" The answer is "No."

"Stomach, liver, intestines?" The answer is "No."

252 "Kidney or bladder?" "No."

"Genital-urinary organs?" "No."

"Skin?" "No."

"Glands?" "No."

"Ear or eye?" "No."

"Bones?" "No."

And then in parentheses is: "Answer each 'yes' or 'no.' If 'yes' describe fully and give dates."

Q. The purpose of that is, I assume, the same as No. 7, in order that the Bureau can make an investigation?

A. To find out whether or not the man had any disabilities whatever, anything the matter with him that we might want to inquire about.

Q. Now, Mr. Posey, do you know whether or not it was necessary to have ten per cent, or any particular percentage of disability in order to be rejected or accepted for insurance?

A. Oh, he had to be in good health. If it was a long certain period of time—in this case he had to be in good health or else he had to have a service connected disability to come under Section 304. It was 304 at that time. It was originally 408 of the amendment to the Walrus Insurance Act, approved August 9, 1921. That had a provision to reinstate under 304 Fed. a service connected disability.

253 Q. Did the degree of disability have anything to do as to whether or not you would accept or reject an application?

A. You could accept any one under 304 who had a very serious degree of disability, provided he proved to the administrator or director at that time that he was not permanently disabled, and paid all the premiums in arrears with interest. That was later changed to allow him to set up a lien for those premiums.

Q. Well, now Mr. Posey, referring to this case, I believe he was reinstated under Regulation 14.

A. 14.

Q. Now, under Regulation 14 did the degree of disability have anything to do with whether or not it was accepted or rejected?

A. If he had any disability we wouldn't accept him.

Q. Regardless of degree?

A. Regardless of degree, unless it was a service connected disability, and then he could apply under 304.

Q. Now, Mr. Posey, after a case—after an application was approved and reinstatement granted, what, if any, procedure was there pertaining to later discoveries of disabilities which existed before the reinstatement?

Mr. Collins: Just a minute. Is that in regard to 254 this case or generally?

Mr. Lytle: It is generally, including this case.

Mr. Collins: He may answer.

A. We had no arrangement set up to ascertain whether or not any of these applications were obtained through representation, for the reason that we had such a large number of applications. We have today about 600,000 policies, and it would be more expensive to investigate all those cases for the sake of the few cases in which a representation has been made. It would be cheaper to pay the representation cases; it would be cheaper for the Government.

Mr. Lytle:

Q. So you determine from those answers whether or not an investigation was necessary?

A. Relied on those completely.

Q. You relied on those answers completely?

A. Absolutely.

Q. Is that true?

A. Yes, sir.

Q. And if they said they had nothing you relied on that, is that correct?

A. Yes, sir, we did.

255 The Court: Just a minute.

Q. In answer to the question you just made, suppose you find out what you think was a fraudulent representation? Do you ever pay back the premiums that soldier made during this period of years after that time?

A. We tried to, your Honor, but they wouldn't allow

it. The Comptroller General told us that we had to leave the chips the way they fell, couldn't hand the money back.

Mr. Lytle: If your Honor please, I would like to object to your Honor's question. They are not permitted by law.

The Court: Well, that is what he said. I know that no private company would be permitted to come in and keep the premium and still claim the policy was no good. It is not permitted by law.

Mr. Lytle:

Q. Mr. Posey, where were the compensation disability officer retirement files kept in the Bureau?

A. Well, your compensation files, as a rule, are in the field office.

Q. And where are they, all over the country?

A. All over the country in the various regional offices or facilities. They are now—or in some cases they are in the regional offices, but your adjusted compensation files, that is—by the way, you mean compensation for service injury, don't you?

Q. Yes.

A. That would be the file in the field, but adjusted compensation file, that is a so-called bonus, that is located at Washington. The rehabilitation file is located—allotments and allowance file—is at Washington.

Q. Where are the emergency retirement compensation files kept?

A. They are at Washington, too.

Q. Where are the disability allowance files kept?

A. At Washington.

Q. Do you have access to those in connection with insurance?

A. We have access to them if we have any reason to draw them.

Q. Well, is knowledge of those files—do you have knowledge of what is contained in those files?

A. None whatever, unless it is brought to our attention some way.

Q. And how is it brought to your attention?

A. Well, usually it is when something happens in the way of settlement. That is about the only time that we ever have occasion.

257 Q. A claim?

A. Yes, a claim.

Q. And insurance matters are separate and distinct from compensation and officers' retirement?

A. In a death case or permanent total disability the files are assembled, and then all put together.

Q. Then the claim is filed, you mean?

A. Yes.

Q. But before there is a claim, are the compensation files separate from the insurance files?

A. Separate and distinct.

Q. And are the officers—emergency officers retirement files separate from the insurance files?

A. Also separate from the compensation files.

Q. Are the disability allowance files kept separate from the insurance files?

A. Disability allowance files are kept separate from the insurance. They are now kept in the compensation folder.

Q. And are they handled by the same section, service, insurance service, or by other services?

A. No, they are handled by the compensation bureau.

Q. And is that separate and distinct from the insurance service?

258 A. Just as distinct as it can be. It is under another assistant director, assistant administrator.

Cross-Examination by Mr. Collins.

Q. And all these services are under the administrator of the Veterans' Bureau affairs?

A. Yes.

Q. So it is all in one department?

A. Yes, sir.

Q. And you think the arrangement whereby—a disability application would be on file in 1928 right in the Veterans' Bureau where a man is carrying a policy right in the Veterans' Bureau, do you think the Veterans' Bureau from '28 to '34 ought to accept monthly premiums without making any investigation in determining whether or not that disability has affected his policy?

A. I certainly do. I think it is perfectly proper to accept them. We rely on statements the man makes to the Bureau.

Q. Do you think it is fair for the assured to do it that way?

A. Well, you are asking me now for my opinion. I

would like to see some arrangement to pay the cash value back, or something of that sort, but that isn't the law.
259 I haven't anything to do with that.

Q. Well, you aren't proceeding under law when you say that you don't have to examine any of those disability applications in the Veterans' Bureau, or in the same bureau to determine whether or not a veteran's policy ought to be canceled? You aren't following any law in proceeding that way, are you?

A. Well, I don't quite get your question.

Q. Well, there is nothing in the law that says you shall not examine—that the insurance department shall not examine the applications filed with the disability branch?

A. No, sir, there are no inhibitions or prohibitions.

Q. It is just a question of practice within the Bureau, isn't it?

A. It is the practice, sir.

Q. And you regard that as a fair practice?

The Court: Well, it doesn't make any difference whether it is fair or not. That is the practice.

Redirect Examination by Mr. Lytle.

Q. Mr. Posey, Mr. Collins asked you about the law and practice in the Bureau. Would it be possible to keep track of every claim for compensation where the alleged claimed some disability before the reinstatement?
260 Would it be possible to do that?

A. No, sir. We have statements coming in there at the average of, I guess, of three or four thousand a month. Many policies that go six or eight months—in cases where they call attention to the fact that they have been treated for physical disability we are now pulling those files, and investigating how serious it is, to see whether or not it is service connected, because under that law a man with service connected disability can reinstate any time within two years providing the disability service is service connected.

Q. Would it be possible for the insurance service of the Veterans' Administration to keep track of every compensation file throughout the service?

A. You triple your force to do it.

Q. Could it be done, then?

A. Well, it might be done. There is nothing impossible, sir; that is, in the way of operations, I mean.

— Q. Does the insurance service of the Veterans' Administration have a system or practice to investigate and cancel policies if they do find there has been fraud when it comes to their attention?

A. Oh, if it comes to their attention.

Q. As soon as it comes to their attention?

261 A. As soon as it does the administrator—he is but a clerk—if a clerk finds what looks like, what might be fraud, it is their duty to take it up to the next person, because we don't want to drag it along.

Q. And have it investigated?

A. Yes. We have canceled policies; that is, we have written the people and nearly every one of the cases where we have canceled, which has been only a very few—the percentage of cancelations or refusal to pay for misrepresentation is infinitesimal to the large number of claims we have.

Q. Well, Mr. Posey, just one more question: Is there any practice in the Bureau that where after an insurance policy is reinstated, that out in the field somewhere a man files a claim for compensation, that that compensation file is immediately sent back to the insurance service?

A. None, sir. The fact is, sir, we have 100,000 policy holders today who have C-files that the insurance men in the insurance field have never even seen, never seen the C-file—the reason those men have continued the insurance, and there is no reason for our going into it.

The Court: Well, we will recess until 10:00 o'clock tomorrow morning. Ladies and gentlemen, don't discuss the case in any way. The jury will retire.

(Whereupon an adjournment was taken to Wednesday, April 17, at 10:00 o'clock A. M.)

Milwaukee, Wisconsin,
April 17, 1940,
10:00 o'clock A. M.

Court met pursuant to adjournment last above noted.

All parties present. Jury in the box.

The Court: I ask counsel for the government about how much time he estimates will be required to put in the balance of his case.

Mr. Lytle: Probably three-fourths of an hour.

The Court: I think the case scheduled for ten o'clock this morning will be adjourned until two o'clock this afternoon and the bailiff, you might inform the other jurors that are waiting that if they report back here at two o'clock this afternoon, it will be sufficient.

Mr. Lytle: Dr. Field.

ALBERT FIELD, called as a witness herein on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lytle.

Q. What is your full name, please?

A. Albert Field.

263 Q. Where do you live?

A. Downers Grove, Illinois.

Q. What is your occupation and profession?

A. Physician and surgeon.

Q. How long have you been a physician and surgeon?

A. Thirty-six years.

Q. Of what schools or colleges are you a graduate of?

A. Northwestern University in 1904.

Q. And, doctor, have you ever specialized in any branch or profession?

A. Yes, sir.

Q. What branch?

A. Eye, ear, nose and throat.

Q. How long have you been specialized in eye, ear, nose and throat disease?

A. Sixteen years.

Q. Pardon?

A. Sixteen years.

Q. Doctor, what is sinusitis?

A. Sinusitis is what we understand as an inflammation of the mucous membrane lining all the areas, all the sinus areas, the maxillaries, the ethmoids, the frontals.

264 Q. Where are the frontals, maxillaries and the ethmoids?

A. The maxillaries are situated in the two jaws, right and left, upper jaws. The frontals above the orbit—sometimes there is more than one cell, several cells, sometimes there is not.

Q. Where are the frontals?

A. That is where the frontals are.

Q. And where are the ethmoids?

A. The ethmoids are in the posterior portion of the nasal passage.

Q. Now, doctor, what does the term "sinusitis" mean?

A. It means an inflammation of the sinuses.

Q. What is it caused by, doctor?

A. There are many causes for sinusitis—flu, grip.

Q. No, I mean—is it generally caused by infection?

A. Yes, I would say infection.

Q. And does that imply a poison, doctor?

A. Yes.

Q. Infection?

A. Quite possible. Toxic poison.

Q. Does sinusitis of the frontal sinuses, for instance, or any of the sinuses, have any effect upon the throat?

265 A. Yes, quite often.

Q. What effect does it have on the throat?

A. The toxic poison may drip down to the membranes of the pharynx, the walls of the pharynx, the pillars of the tonsils, and straiti seep down into the larynx, bathing and washing the cords of the vocal cords with same toxic poison.

Q. Can sinusitis, or the toxic poisoning from sinusitis, have any effect on the heart, doctor?

A. I couldn't answer that definitely.

Q. You don't know what effect it has on the heart?

A. No, I don't.

Q. But can it—can the infection from sinusitis be introduced into the blood stream?

A. Oh, most assuredly.

Q. And if it is introduced into the blood stream, that goes all through the system, does it?

A. The toxic poison.

Q. What effect would toxic poison have on the heart?

A. Well, it could damage the heart in various ways.

Q. Do you know what myocarditis is?

A. I know about it. I know it is an infection of the heart muscle.

Q. Could infection through sinusitis have any relation to myocarditis?

A. Well, it is quite possible that it could.

Q. Doctor, do you have an independent recollection of having examined one Lawrence W. Pence, independent of records?

A. No. I may have examined him years ago.

Q. I hand you Plaintiff's Exhibit No. 18, doctor, referring to the ninth page, with the pen and ink name "A. Field" at the bottom. Is that your signature?

A. That is my signature.

Q. Will you refer to Plaintiff's Exhibit No. 18 for the purpose of refreshing your recollection and state what diagnosis you made there?

A. This examination is made on the 27th of February, 1933, and the examination was solely on the nasal and throat. I found fair ventilation in both nares. Marked tenderness over the frontal sinuses. Mild deviated septum and the X-rays at that time report the X-rays showed that all sinuses were clear and normal. My diagnosis at that time was chronic catarrhal rhinitis, with profuse discharge and mild deviated septum.

Q. Did you ever have occasion to amend that diagnosis, doctor?

267 A. Subsequently a few days later we were asked to review this case, the diagnosis, on account of the previous numerous diagnoses that had been made of sinusitis with this patient, and we called for the films, and on reviewing the sinus films, we found there was some clouding in the maxillary and some in the frontal.

Mr. Collins: Q. Some what?

A. Some clouding in the frontal and also in the maxillary, upon which evidence we added to the diagnosis "chronic frontal and maxillary sinusitis, with copious discharge."

Mr. Lytle: Q. Doctor, what is chronic catarrhal rhinitis?

A. That is an inflammation of the nasal passage of the mucous membrane, an inflammatory condition which may come from an ordinary cold or the flu or the grip.

Q. Doctor, referring to frontal sinuses, does that have any connection with the bones of the head?

A. Yes, that is in the frontal bone.

Q. It is?

A. Yes. These sinuses communicate with the passage down through the throat. It is the same as the maxillary sinuses of a normal passage which is occluded.

Q. Doctor, can sinusitis exist over a long period or is it a condition for a short time?

A. Oh, it is long standing as a rule. It extends over long periods. Sometimes never gets cured, and other times curable.

Q. Do you know whether or not, doctor, at the time you examined doctor Lawrence W. Pence in February, 1933, you had an opinion as to whether or not that case was curable or incurable at that time?

A. (No response.)

Q. Do you know the answer? Yes or no?

A. No, I can't answer that.

Q. Did you, when you examined Dr. Lawrence W. Pence in February, 1933, did you have the X-ray films or did you accept the roentgenologist's report?

A. I accepted the roentgenologist's report of the examination that was made. We reviewed that, saw that several days later.

Q. Oh, that is when you changed the diagnosis?

A. Yes, that is when we added to the diagnosis.

Q. Did the X-ray have any effect on your final diagnosis, doctor?

A. Yes, it did.

Q. Pardon?

269 A. It certainly did.

Q. Did it confirm your finding of sinusitis?

A. Yes, sir.

Mr. Lytle: You may cross-examine.

Cross-Examination by Mr. Collins.

Q. Doctor, where are you stationed now?

A. At Hines Hospital, the government hospital, at Hines, Illinois.

Q. You never examined Dr. Pence until 1933?

A. I don't remember ever seeing him before.

Mr. Collins: That is all.

Mr. Lytle: That is all.

The Court: Doctor, I want to ask you a question.

Q. Assuming that a patient has a frontal sinusitis, and had been treated for it, would you say that that was a treatment of a disease of the throat or lung?

A. No, not necessarily.

Q. Would you think that that would come under the category of a treatment of a disease of the bones?

A. No, I wouldn't.

Mr. Lytle: What was that?

The Court: I asked the doctor if he thought whether
270 sinusitis would be in the category of treatment for the lungs or a treatment of the bones, and the answer was "No."

Redirect Examination by Mr. Lytle.

Q. Doctor, you say it wouldn't come under the treatment of the bones of the head?

A. No. These are not the bones themselves, these are the cavities in the bones.

Q. The cavities in the bone?

A. The antrums, the chambers, in which the condition exists. The membranes are thickened, polypoid growths are in there, and the whole condition—we operate, we go in there and clean it all out.

Q. Acute exacerbations of sinusitis; what is that?

A. Well, those are repetitions of the chronic condition cropping up every so often in acute exacerbations.

Q. What happens with reference to the effect that the acute exacerbations has upon the general system?

A. Well, it is detrimental. It has a tendency to travel into other parts of the body and create other conditions.

Q. Including the blood stream?

A. I think so.

271 Q. And does the blood stream carry any infection to the heart?

A. Yes, it does.

Mr. Collins: That is all.

The Court: All right, doctor.

(Witness excused.)

Mr. Lytle: Dr. Brogan.

AUSTIN J. BROGAN, called as a witness herein on behalf of the defendant, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Lytle.

Q. What is your full name, please?

A. Austin J. Brogan.

Q. Where do you live?

A. I live in Maywood, Illinois.

Q. What is your occupation and profession?

A. I am a physician.

Q. How long have you been a physician, doctor?

A. Since 1931.

Q. What schools or colleges are you a graduate of?

A. Liberal Arts, Columbia University, 1927; Medical School, Harvard, 1931.

*272 Q. Do you specialize in any branch of the profession?

A. I do.

Q. In what branch?

A. In roentgenology.

Q. That applies to—that is another term for X-ray films?

A. That is right.

Q. Have you had any experience in reading X-ray films, doctor?

A. Yes, sir.

Q. Are you employed at the present time?

A. Yes, sir.

Q. Whereabouts; by whom?

A. At the Veterans' Administration, Hines Facility.

Q. Hines, Illinois?

A. Yes, sir.

Q. What are your duties there?

A. I am assistant roentgenologist.

Q. Do your duties involve reading X-ray films?

A. Yes, sir.

Q. And diagnosis from X-rays?

A. Yes, sir.

Q. How long have you been there, doctor?

A. I have been stationed at Hines, Illinois since 273 January the 20th, 1938.

Q. How many X-ray films do you have occasion to read a month in round figures, doctor?

A. That is difficult to estimate. In the absence of the roentgenologist I would say approximately five to six hundred a month.

Q. Pardon?

A. Five to six hundred a month.

Q. Five or six hundred a month?

A. Yes. In the presence of the roentgenologist, the work is divided.

Q. Who is the chief roentgenologist?

A. Dr. Lyons.

Q. And where is he now?

A. Dr. Lyons is now, as I understand, in Seattle. His mother is ill.

Q. Do you know when he went to Seattle?

A. He went to Seattle Friday last, by plane.

Q. For what reason?

The Court: His mother is ill, he said.

• Mr. Lytle: Q. As assistant chief of the X-ray 274 clinic at Hines Hospital, are you the official custodian there of the records?

A. In the absence of the roentgenologist I am the custodian.

Q. Of what?

A. Of the films, the records, in the department.

Q. I see. Doctor, do you have with you any X-ray films of the one Dr. Lawrence W. Pence?

A. I believe I do.

Q. Will you let me see those, please?

(Witness produces documents referred to.)

Mr. Lytle: I will ask the court reporter to mark these for identification.

(Said documents marked for identification Defendant's Exhibits S to Y inclusive.)

A. I would like to amend a statement, your honor.

The Court: Yes.

A. I said I read five hundred films during the month.

The average number of films taken a month at Hines, Illinois, runs from five to six thousand, not five hundred.

Mr. Lytle: Q. You mean five to six thousand?

A. Five to six thousand films a month.

Q. I hand you Defendant's Exhibits for identification numbers W, X and Y, and ask you what they are?

A. These are roentgenograms taken expressly for the purpose to show the accessory nasal sinuses.

Q. What do they show with reference to the sinuses, doctor?

A. Do you wish me to make an interpretation of the films at this time?

Q. Can you make it?

A. My impression as I look at them is that there is some slight cloudiness of the lower portion of the maxillary sinuses and slight clouding of the frontal sinuses, which findings are consistent with the diagnosis of sinusitis.

Q. Sinusitis. All right, doctor. I hand you Defendant's Exhibits for identification S, T, U and V; and ask you to refer to those in their order and state what parts of the body they are X-ray films of?

A. These smaller films are roentgenograms of the region of the stomach taken a short time following the ingestion of a meal, containing barium. This film here, as identified, this is the film of the entire abdomen, identified to show that it was taken five hours after the original films, to show if there is any abnormality, principally if the

barium meal remains in the stomach or has passed through the stomach and intestinal tract. This film purports to be a twenty-four hour film following the original films, also to show if there is a residue in the stomach and in what portion of the intestinal tract the meal is now contained.

Q. And, doctor, what are those, from a medical standpoint; what do those films show with reference to any abnormality, if any at all?

A. Well, these films represent a portion of an examination. They are not a complete examination, because the gastro-intestinal examination is not complete without a fluoroscopic study.

Q. The question is what do they show?

A. These show a stomach filled with barium and show barium in the duodenal trap; the barium is distributed in the duodenal trap and jejunum. At five hours the stomach

is empty and the barium meal at that time is largely in the colon or large intestine. Some of it is probably expelled. At twenty-four hours there is a portion of the barium meal still remaining in the colon or large intestine, and there is a small amount of barium in the appendix.

Q. What do they show with reference to the duodenal ulcer?

The Court: If anything.

Mr. Collins: I object to the question as leading.

277 The Court:—You can't lead the witness that way.

You know that. That is not the proper form of the question.

Mr. Lytle: If your honor please, counsel for the plaintiff has put in evidence, has shown in evidence that this man had a duodenal ulcer in 1933. That is in evidence.

The Court: All right; but this witness is talking for himself, not what somebody else says.

Mr. Lytle: Q. Doctor, state whether or not those X-ray films disclose the presence of a duodenal ulcer, if any?

A. I would say these films are consistent with the diagnosis of duodenal ulcer.

Mr. Lytle: That is all.

Mr. Collins: Before I cross-examine, I want to take exception to the remark that I put in things that showed the presence of duodenal ulcer. I put in certain exhibits in which duodenal ulcer might have been mentioned, but I haven't put in anything which shows the presence of a duodenal ulcer, and there isn't any diagnosis—

Mr. Lytle: If your honor please.

(Document handed to the court.)

The Court: All right. Proceed.

278. *Cross-Examination by Mr. Collins.*

Q. Doctor, what do you mean by barium?

A. Barium is a chemical compound which is opaque to the X-ray.

The Court: Well, let us not spend a lot of time on that.

Mr. Collins: That is all.

(Witness excused.)

Mr. Lytle: Defendant rests.

The Court: Anything further? We will excuse the jury for three or four minutes. Counsel desires to make some motions.

(Whereupon the jury retired from the court room and the following proceedings were had out of the presence and hearing of the jury:)

The Court: I was informed by Mr. Lytle, counsel for the government, that a certain article had appeared in the Milwaukee Journal last evening which he felt—with reference to which he desired to hear—to make some motions or to make some record, and I told him before he closed his case he would have the opportunity to do so, and I have excused the jury now so that you may, if you desire to, make any reference with regard to the article.

279 Mr. Lytle: If your honor please, the defense at this time wishes to call the attention to the court and to the fact that in the Milwaukee Journal of Tuesday, April 16, 1940, there appeared an article headed: "Policy Action called Unfair." It reads as follows: "Judge Duffy censures government procedure in war risk case.

"The government's procedure in denying a man disability compensation on the ground he was in good health and then refusing payment of a \$10,000 war risk insurance policy on the same man on the ground that he had concealed his true condition, was declared 'manifestly unfair' Tuesday by Federal Judge F. Ryan Duffy. Judge Duffy made his remark during a recess in the trial of the suit of Mrs. Harriet V. Pence, 3817 West National Avenue, widow of Dr. Lawrence W. Pence, against the government to collect on her husband's policy. Dr. Pence, who died September 21, 1934, was a physician at the Soldier's Home as a World War veteran. The jury had been excused for argument at the request of William B. Collins, counsel for Mrs. Pence, for permission to introduce the records showing the ailments listed by Dr. Pence when he applied for disability compensation, and the reports of the government physicians denying the application, and re-
280 porting that Mr. Pence was not afflicted with the ailments he had listed.

"The request was opposed by William E. Lytle of Chicago, special government counsel. Lytle said that the compensation application was rejected by a different department other than the one which refused the insurance payment and that the reports had no bearing on the present case. He also asserted Dr. Pence had not been given a physical examination for disability compensation.

"It seems manifestly unfair in this case for the government to use a statement of a man trying to get dis-

ability compensation by claiming he had a sinus infection when the government claimed he did not have it and now to use the claim to prove that he did have it,' Judge Duffy said.

"It doesn't seem that the government acted in very good faith."

"The court reserved decision on admitting the evidence."

At the time the remarks were made, which may or may not be in accordance with the report appearing in the Milwaukee Journal, but which the record will disclose, counsel for the government did not object for the reason that although the trial was continuing, the jury had been excused for the purpose of introducing and discussing 281 and making objections on certain evidence and as heretofore said, the government counsel did not object for the reason at that time that he had no idea that such information might come within the knowledge of the jurors. However, and the government counsel watched during the afternoon of April 17 until four o'clock, when the first edition of the Milwaukee Journal came out, to see if it appeared in that edition.

The Court: April 16.

Mr. Lytle: But it did not so appear in the four o'clock edition and it wasn't possible, therefore, for counsel to call the matter to the court's attention since it didn't come to the government counsel's attention until approximately nine-thirty P. M., April 16, and the matter was called to the court's attention the morning of April 17 when the court granted counsel the right to state, to make a statement for the record of the occurrence as it happened. The government, by counsel, hereby states that it feels that in the event any jurors have read the aforementioned article or have been told about it, that such information, such a statement by the court would be highly prejudicial to the defendant in the lawsuit now in the course of trial, and for that reason at this time and at the first opportunity available now objects to the said remarks and 282 states to the court that he doesn't feel that the prejudice to the government can be eliminated by instruction for the reason that the prejudice, if it exists, is so harmful that it comes within the phraseology of Mr. Justice Cardozo, United States Supreme Court, who has stated in the case, not at the moment recalled, that there is some

certain harmful errors, which can not be instructive in the minds of jurors, that therefore he asks leave of the court in order not to delay this trial and put the court and the plaintiff and the government to additional expense, he asks leave of the court that in the event that this case continues to its ultimate conclusion, and in the event the jury should find the issues for the plaintiff, that the court have the jury polled for the purpose of determining whether or not any of such jurors had read such article or had heard it discussed or had been advised, or had any knowledge whatever in regard to it.

Mr. Collins: May it please the court—

Mr. Lytle: Just a second. I would like to see if there is anything further.

That is all.

Mr. Collins: May it please the court:

283 Mr. Lytle: I would like to say that with all due respect to the court.

Mr. Collins: I just wish to say one or two words, and one is that I think I regret the publication of that which the court said was really off the record and wasn't made in the presence of the jury as much as anyone; and I would like to say, to keep the record clear, that at no time yesterday did I talk to any reporter of the Milwaukee Journal or anybody else; and also I want the record to show that, secondly, I don't believe that it would be fair for counsel to reserve his right to have a jury polled only in case a verdict were returned favorable to the plaintiff. I think that if there is any action to be taken on this, it should be taken right now. I regret very much that anything like that has come into this trial. I do think, however, that the court by a very careful endeavor and absolute instruction can so instruct the jury without referring to the substance of the parts so as to relieve the minds of the jury as to what might be entertained which is claimed by counsel. I think the jury in this case has very great respect for the court, and I think that the court should go the limit in instructing the jury if any of them happened to have read that article or have been told, that
284 they were entirely to disregard it and that it is to be washed out of their minds as if it never existed. However, that is a matter of sole discretion of this court.

The Court: The statement made by the court was made off the record and would not have been made if the jury had been present. The court feels exactly today as it did

yesterday as to it, that it is not fair for the government to use statements of a man in one case where the government proved that he had sinusitis after the government had determined with reference to those applications that he didn't have it in another branch of the government, but that was off the record, and it had no part in this case. It was of very doubtful propriety for the Journal, or any paper, to have published the article. The court in this case is going to instruct the jury that if any of them have read the article or heard anything about it, that they are to recall their oaths that they are to decide this case solely on the evidence that is in evidence, and under no circumstances must any attention be given to what is purported to have appeared in that article. If they didn't read it, or what they read when they saw it themselves—

Mr. Lytle: If your honor please, in view of counsel's remarks and the court's statement just made, I feel it 285 is my duty to move the court at this time for a mistrial.

The Court: Motion denied.

Mr. Lytle: Exception.

Mr. Collins: I wonder, I am not sure at this time what the status of the record is on those reports. In disallowing those reports as exhibits, I am satisfied. I intended to prove by those reports, of course, things that—that these various applications made by Pence to the government were turned down, and I think a stipulation would save any time, would save a good deal of time.

The Court: Well, I ruled on that before, and I think the ruling will remain the same. I said you could renew the motion after the defense came in with their testimony. My intention was that if the government used statements that Pence made in which he says "I have sinusitis," that, as a matter of fairness, perhaps you ought to be able to show that the government found that he didn't have sinusitis, but that involves reports that were made by another branch of the government under a different law that where a percentage of the disability in one case was required—and I have therefore determined that—that 286 shouldn't properly be before the jury,—is not properly before the jury, and therefore am not going to have any testimony as to that, neither as to whether it was turned down.

Mr. Collins: Then I will refrain in my argument—

The Court: All right.

Mr. Collins: The plaintiff rests.

The Court: How much time do you think you ought to have to present your argument?

Mr. Lytle: Usually 45 minutes to a side has been my experience and has been ample, your honor.

The Court: All right; 45 minutes will be used up.

Mr. Lytle: May I at this time make up my motion for directed verdict? At this time the defendant moves the court to direct the jury to return a verdict for the defendant for the reason that the defendant has proven beyond a reasonable doubt that the deceased insured in this case made material representations to the government with the full knowledge that they were untrue when he applied for reinstatement of his insurance contract on June 21, 1927, and because the evidence shows clearly that Dr. Lawrence W. Pence, the deceased insured, who was a physician himself, stated at the time of said reinstatement that he never consulted a physician, even regardless of his health, and under the law it is not material or
287 necessary as to what he consulted a physician for.

Under the law it is merely fraud, if he merely consulted a physician regarding his health, and because it has been conclusively shown by Dr. Pence's own statements and testimony of the witnesses, medical witnesses which he named himself as having attended him, who testified in this court that they treated him. For the further reasons that Dr. Pence in his application for reinstatement of insurance stated that he had suffered no disease, injuries of certain parts in the body at any time, and because the evidence conclusively shows that Dr. Pence did suffer with disease of parts of the body and parts of the body related to the very disease which were contributory to his death; and for the further reason that Dr. Pence stated that he was in as good health when he made the application as he was when he, when his insurance lapsed, in 1920, and the evidence shows that he was not in such good health.

The Court: The motion for directed verdict, the ruling on that will be withheld at this time under Rule 50 of the Federal Rules of Civil Procedure. The verdict of the jury will be taken, subject to the motion for a directed verdict. The verdict that is to be submitted to the jury, for the information of counsel, will be the usual form of general verdict used in this court, the form being: "We,
288 the jury duly sworn and empaneled to try the issues

in the above entitled cause, find the issues herein in favor of the plaintiff."

The other form: "We, the jury duly sworn and empaneled to try the issues in the above entitled cause, find the issues herein in favor of the defendant."

Mr. Lytle: If your honor please, may I at this time submit the instructions?

The Court: It is pretty late for them.

Mr. Lytle: Under the rules I am required to furnish them any time before the case is gone—

The Court: Unless the court designated some earlier time, and it is the custom here to submit them early enough so the court may have a proper opportunity to go over them. All right.

Mr. Lytle: I am sorry, your honor. I would have submitted them earlier if I had known.

The Court: You could have just as well turned them in this morning as now.

Mr. Lytle: Pardon me.

The Court: I would like to state in that regard that 289 one of those instructions I didn't write until this morning, and I couldn't write it until this morning in view of the articles in the newspaper.

(Whereupon a short recess was taken.)

After Recess.

(Arguments to the jury.)

290

Judge's Charge to the Jury.

This case will be submitted to you upon a general verdict. This is a different form of verdict than a special verdict, with which some of you may be familiar by reason of your service as jurors upon previous cases at this term. In a special verdict the jury answers certain specific questions. In this general verdict, you will be called upon to find either for the plaintiff or the defendant.

In all ordinary civil cases, the burden of proof is upon the plaintiff to satisfy you, the jury, to a reasonable certainty by a preponderance of the evidence of the existence of every fact, substantially as alleged in the complaint. By "burden of proof" is meant the duty resting on the party having the affirmative of the issue, to satisfy the minds

of the jury, by a preponderance of the evidence, of the truth of his contention. By a "preponderance of the evidence" is meant the greater weight or convincing power of the evidence.

In order to entitle one upon whom rests the burden of proof to a finding in his favor, his evidence must not only be of greater convincing power than that offered in opposition, but it must be such as to satisfy or convince the minds of the jury of the truth of his contention.

291 However, the preponderance of the evidence does not necessarily depend upon the number of witnesses on either side, although that is one thing to be considered; but it depends likewise upon the weight and credibility which you attach to the evidence of each witness; in accordance with the rules that will be laid down to you in these instructions.

You may be satisfied that the evidence of one witness is entitled to greater weight and credibility than that of another witness, or even several witnesses; and you may give it such weight in determining where the preponderance of such evidence lies.

In this case the evidence shows without dispute that the plaintiff, Harriet Pence, is the widow of Doctor Lawrence W. Pence, who enlisted in the Medical Service of the U. S. Army during the World War, and later was honorably discharged. While in the service, on September 4, 1918, he applied for government life insurance. A policy was issued and remained in force and effect until about February 1, 1920. I think February 1, 1920 was the time last when there was a default in the payment of premium and that policy lapsed because of non-payment of premium.

Congress passed certain laws permitting veterans to
292 reinstate their government life insurance policies; and on June 21, 1927, Doctor Pence filed an application asking the reinstatement of his government insurance. This reinstatement was granted as of July 1, 1927. There was issued to him, I believe it was called a five year convertible term policy, and it was renewed so that it would have expired June 30, 1937. Doctor Pence paid the premiums on his government insurance after it was reinstated as of July 1, 1927. He died on September 21, 1934. It has been stipulated that if the policy on the life of Doctor Pence was validly and lawfully existing at the date of his death, his beneficiary, the plaintiff herein, would be entitled

to recover the amount of the policy: \$10,000.00. The question in this case is whether it was validly existing.

The plaintiff has made out what is known as a prima facie case, showing the existence of the policy of insurance; the death of the insured, who the beneficiary was, etc. The burden of proof then shifted to the defendant because the government contends that statements made by Doctor Pence in his application for reinsurance, dated June 21, 1927, known as Plaintiff's Exhibit 3, were false and that the same were made knowingly and fraudulently by the Doctor.

In Paragraph 4 of the application, the following appeared:

293 "As a condition to the reinstatement of this I do hereby certify that the answers to the following questions are true to the best of my knowledge and belief, and are made as of the day on which the application is submitted to the Bureau or deposited in the U. S. Mail."

That date, for the purpose of this case, will be considered the date of the application, to-wit: June 21, 1927. Among the questions that followed were:

Question 5: Are you now in as good health as you were at the due date of the premium in default?

Answer: "Yes."

Question 7: Have you been ill, or contracted any disease, or suffered any injury, or been prevented by reason of ill health from attending your usual occupation, or consulted a physician in regard to your health since lapse of this insurance? (Answer Yes or No.)

If so, give dates and full particulars, including the name and address of physicians.

Answer: "No."

Doctor Pence's signature appears on the bottom of Page 1 on which the foregoing questions and answers appear.

On the second page, under the heading of "Medical Examination" there is a sub-heading entitled "Applicant's Own Statement." Question 11 appears as follows:

Have you ever been treated for any disease of Brain or nerves? And the answer is "No."

Throat or lungs? And the answer is "No."

Heart or blood vessels? And the answer is "No."

Stomach, liver, intestines? And the answer is "No."

Kidney or bladder? And the answer is "No."

Genito-urinary organs? And the answer is "No."

294 Skin? And the answer is "No."

Glands? And the answer is "No."

Ear or eye? And the answer is "No."

Bones? And the answer is "No."

Doctor Pence's signature likewise appears on the bottom of Page 2, on which the foregoing questions and answers appear.

An important question for you to decide is: Not only were any of those answers false when made but also whether Doctor Pence did believe his answers, and especially to Questions 5, 7, and 11, whether he believed they were true at the time that he made them, that is, on June 21, 1927? Question 5 is simple in its terms: "Are you now in as good health as you were at the due date of the premium in default?" That is, Doctor Pence was asked whether he was in as good health on June 21, 1927, as he was on February 1, 1920. /

You will note that Question 7 inquired of Doctor Pence whether he had been ill, or contracted any disease, or suffered any injury, or consulted a physician, or whether he required any time off because of illness in regard to his health since February 1, 1920; and that if he did, he was to give the dates and full particulars, including the name and address of any physician he consulted. It would not be a false answer to this question if there was a consultation with a physician, or an injury suffered, or a disease 295 contracted at a time prior to February 1, 1920; and when the inquiry is made as to whether Doctor Pence had been ill, it meant something more than a passing indisposition or trivial ailment, such as a passing cold or headache, passing headache.

You will recall that Question 11 asked whether the Doctor had been treated for any disease of—and then mentions—various parts of the body. There is no time limit on this question as there was on Questions 5 and 7. It appears quite certain from the evidence that a treatment of Doctor Pence for sinusitis would not come under any of the specifications or subsections of Question 11. I believe one doctor testified to the contrary, that it might come under treatment of a disease of the throat. Therefore, because of that conflict, you are not bound by my opinion in this respect, and you may yourselves determine from the evidence, irrespective of my opinion, whether

treatment for sinusitis, which is an inflammation of the membrane of the sinus, could be included in that sub-section of the question, "have you ever been treated for any disease of the throat or lungs?" No claim is made, I believe, by any of the other witnesses that any other sub-section of Question 11 could possibly cover the treatment for sinusitis. You will recall I have been mentioning sinusitis and not myocarditis or any of the other diseases that it was claimed that the doctor had.

In answer to a question propounded by the court, some mention was made that no offer to return the premiums paid by Doctor Pence had been made by the government. You are instructed that under the law the government is not permitted to return or offer to return such premiums. Therefore, the fact that there has not been a return or offer of such premiums must not be considered by you in any way in reaching your verdict. The officials of the government, of course, cannot do something which is not authorized by law.

When an allegation of fraud or fraudulent conduct is made by a party to a lawsuit, the burden upon that party to establish such fraud is greater than with reference to many ordinary contentions in lawsuits. The defendant here must establish by more than a preponderance of the evidence, which I have heretofore defined for you; the defendant must establish by clear and satisfactory evidence, to a reasonable certainty, that at least some or one of the foregoing answers made by Doctor Pence in his application were in fact false and were known by Dr. Pence to be false when made.

The application for reinsurance made by Doctor Pence formed a part of the contract of insurance, and all representations made by him which are material to the risk, such as to those questions mentioned, must accord with the truth; otherwise the contract would have no validity and there would be no valid contract or policy of insurance. The government relied upon the answers to the questions contained in Doctor Pence's application for reinstatement, and if the answers were wilfully and intentionally false, the intention to deceive follows as a matter of law.

The policy of insurance issued to Doctor Pence contained a clause that it would be incontestable after six months from July 1, 1927, Except for fraud and non-

payment of premiums. There is no question in this case as to non-payment of premiums. Therefore, it is necessary to consider what the word "fraud" means in the connection in which it was used. If the answers to questions made by Doctor Pence were false and were knowingly and wilfully made, with intent to deceive, then there was fraud and the policy would be contestable by the government. But any unwitting or non-wilful misstatement of facts would not constitute fraud. If Doctor Pence honestly believed the answers were true when he made them, there would be no fraud. A misrepresentation of a material fact does not amount to fraud unless it was intention-
 298 ally untrue or was made with a reckless disregard for its truth or falsehood. It is, therefore, for you, the jury, to determine whether Doctor Pence used wilful and intentional deceit in obtaining the reinstatement of his insurance.

If the government has convinced you, by clear and satisfactory evidence, to a reasonable certainty, either

(1) that Doctor Pence's condition of health was not as good on June 21, 1927 when he applied for reinstatement of his insurance, as it was on February 1, 1920; or

(2) that Doctor Pence had been ill or contracted any disease, or suffered any injury, or been prevented by ill health from attending his usual occupation or consulted a physician with regard to his health between February 1, 1920, and June 21, 1927; or

(3) that Doctor Pence had been treated for any disease of the brain or nerves; throat or lungs; heart or blood vessels; stomach, liver, intestines; kidney or bladder; genito-urinary organs; skin; glands, ear or eye; or bones, —if, as I said, you are convinced by clear and satisfactory evidence to a reasonable certainty—, then you should find for the defendant. If you are not so convinced, you should find for the plaintiff.

Two forms of verdict will be submitted to you. The first form will be:

"We, the jury duly sworn and empaneled to try the issues in the above entitled cause, find the issues herein in favor of the plaintiff."

299 If, however, you find for the defendant, you should sign the other form of verdict, as follows:

"We, the jury duly sworn and empaneled to try the issues in the above entitled cause, find the issues herein in favor of the defendant."

It is your special duty to scrutinize and weight the testimony of each and every witness. You should, as to his or her manner of giving testimony, consider the witness' demeanor upon the stand; his or her interest in the result of this case; his or her opportunity to know the facts testified about; the reasonableness of the testimony given; and all other facts and circumstances which either support or discredit the testimony of each witness; and then you should give it such weight and credit as you think it fairly entitled to receive. As stated to you heretofore, the weight of the evidence is not to be decided merely according to the number of witnesses, and you may find that the testimony of one witness is entitled to greater weight than that of another, or of several other witnesses, and you may give it such weight and credit in considering your verdict.

In case you become satisfied that any witness has on this trial wilfully testified falsely as to any material fact, you are at liberty in your discretion to discredit all of the 300 testimony of any such witness, except in so far as it is corroborated by other credible testimony.

In considering the issues in this action, your judgment should not be swayed by any feeling of sympathy for the plaintiff or of feeling of loyalty to the government. You should determine the facts of this case solely upon the evidence which has been submitted here in court, considered in view of the instructions which I have given to you.

You are further instructed that the deceased, that is, the insured, whether he was entitled or was not entitled under the law to compensation, emergency officer's retirement pay, disability allowance, or pension has no bearing whatever on the issues presented in this lawsuit. Matters pertaining to claims for disability compensation, emergency officer's retirement pay, disability allowance, or pension is not handled or administered by the same officials of the Veterans Bureau who administer or determine and pass upon the applications for insurance, nor are records pertaining to claimant's physical condition submitted or received by the Veterans Bureau or contained in the same files of the Bureau as matters pertaining to insurance.

You are further instructed that knowledge of the officials of the Bureau obtained in connection with the 301 examination and review of compensation officer's retirement pay and disability allowance or pension may not be imputed to the Bureau charged with and having

the responsibility to pass upon the above application for reinstatement of insurance unless it has been proven that the Director of Insurance or officials in his service delegated by him to do so have obtained that before Doctor Pence's death—in this case the file concerning Dr. Pence's claim—and, of course, there is no evidence of that in this case.

Now, my attention was called to an article that appeared in the Milwaukee Journal last evening with reference to this case. I do not know whether any of you read the Journal or whether you read the article. It purported to narrate some comments that I made in the absence of the jury and off the record, some comments in the discussion with counsel. You are not, ladies and gentlemen of the jury, permitted to reach your verdict in this case with any reference whatsoever to what any newspaper may claim occurred not in your presence. Newspaper articles many times, of course, are not entirely accurate, or are presented in such a manner as to attract readers' interest. You must, therefore, base your decision entirely in this case on 302 the testimony given here in court. If any of you have read this article or any comments have been made to you by anyone else about it, you are instructed that it is your solemn duty to entirely disregard that article, and that anything contained therein must have absolutely no effect whatsoever upon any verdict that you may render here.

You have taken your oath to decide this case upon the evidence and upon the law that has been given to you by the court, and I am sure that you will conscientiously fulfill your duty.

You will select one of your members as a foreman and he or she will preside over your deliberation and sign the verdict that you may agree upon.

Has counsel any additions or exceptions?

Mr. Lytle: If your honor please, may I make a speech to the court out of the hearing of the jury?

The Court: All right.

(Counsel for the plaintiff and the defendant confer out of hearing with the court.)

The Court: The clerk will swear the officers.

(Officers sworn.)

The Court: The Clerk will make the list of the exhibits and see that they are sent into the jury room.

(Jury retires to jury room to decide case.)

303 The Court: Let the record show that prior to the retirement of the jury and out of hearing of the jury counsel for the defendant asked to have noted an exception to the court's instruction with reference to Question 11 and as to the court's opinion that a treatment for sinusitis would not come within any of the subsections of Question 11. The exception is noted.

Mr. Lytle: Did I understand the court to say that treatment or consultation with a physician regarding sinusitis—

The Court: (Interposing) That was question 11: "Have you ever been treated for any disease of . . ." and I said that my opinion was that the sinusitis didn't come under any of the subsections but that the jury wasn't in any way bound to follow my advice. They can come to any conclusion they decide to upon the evidence.

Mr. Lytle: May I say that the Government is fairly well contended with the instructions.

The Court: Thank you.

Mr. Collins: May I say the same thing.

The Court: Thank you.

(Which were all the proceedings had and testimony taken in the above entitled matter.)

422 State of Wisconsin, }
Milwaukee County. } ss.

I, Victor M. Darnieder, a court reporter with offices located at 5011 Plankinton Building, Milwaukee, Wisconsin, do hereby certify that I reported the foregoing proceedings had and testimony taken in the above entitled matter; that the same is true and correct, in accordance with my original Stenotype notes taken at said time.

Victor M. Darnieder.

Victor M. Darnieder.

Filed Nov. 8, 1940. 423 IN THE DISTRICT COURT OF THE UNITED STATES.
* * * (Caption—147) * *

Filed Nov. 8, 1940. B. H. Westfahl, Clerk.

An abridged statement of the contents of the following exhibits introduced and received in evidence at the trial of the above cause:

Plaintiff's exhibit 1: The policy of insurance herein sued upon.

Plaintiff's exhibit 2: Certificate of renewal of insurance.
Plaintiff's exhibit 3: Application for reinstatement, dated June 21, 1927 and medical examination report of June 25, 1927.

Plaintiff's exhibit 4: Application for U. S. Government Life Insurance. (Also Defendant's exhibit I).

Plaintiff's exhibit 8: Application and physical examination report for Civil Service examination.

Plaintiff's exhibit 9: Reports of the Adjutant General of the Army.

Plaintiff's exhibit 10: Physical examination report dated October 10, 1928.

Plaintiff's exhibit 12: Application for conversion to U. S. Government Life Insurance (Also Defendant's Exhibit H).

Plaintiff's exhibit 13: Physical examination report dated June 3, 1929.

Plaintiff's exhibit 14: Physical examination report dated Nov. 12, 1930.

Plaintiff's exhibit 15: Physical examination report dated May 27, 1931.

Plaintiff's exhibit 16: X-ray or fluoroscope examination report of July 22, 1931.

Plaintiff's exhibit 17: X-ray, fluoroscopic report dated August 2, 1934.

Plaintiff's exhibit 18: Physical examination report commencing February 27, 1933.

Plaintiff's exhibit 19: Physical examination report dated Dec. 9, 1931.

424 Defendant's exhibit D: Insured's application for compensation and vocational training, dated August 27, 1928.

Defendant's exhibit E: Insured's application for retirement dated May 24, 1929.

Defendant's exhibit F: Insured's application for disability allowance.

Defendant's exhibit G: Insured's application for pension dated December 8, 1933.

Defendant's exhibit H: Insured's application for conversion to U. S. government life Insurance dated June 21, 1927. (Also Plaintiff's Ex. 12.)

Defendant's exhibit I: Application for U. S. Government life insurance. (Also Plaintiff's Ex. 4.)

Defendant's exhibit J: Sworn statement by insured dated September 7, 1928.

Defendant's exhibit K: Statement by insured dated Oct. 10, 1928.

Defendant's exhibit L: Statement by insured, bearing Veterans' Administration receipt stamp of Nov. 28, 1931.

Defendant's exhibit M: Statement by insured dated Dec. 8, 1933.

Defendant's exhibit Q: Sworn statement by Dr. L. Grant Glickman dated September 7, 1928.

PLAINTIFF'S EXHIBIT NO. 1.

Plaintiff's exhibit No. 1 is a contract of insurance herein sued upon, providing for the payment to the plaintiff, Harriet V. Pence, of \$10,000, if the policy was valid and if the insured, Lawrence Waldo Pence, died while the policy was in force. Among other provisions it contained the following provision:

"Incontestability. 9. This policy shall be incontestable after the insurance has been in force for six months from the date of issuance or reinstatement, except for fraud or nonpayment of premiums, and the policy is issued free of restrictions as to travel, residence, occupation, or military or naval service. However, no insurance shall be payable for death inflicted as a lawful punishment for crime or military offense, except when inflicted by the enemy: Provided, That the cash value hereof less any indebtedness on the date of such death shall be paid to the designated beneficiary if living, or if there be no designated beneficiary alive at the death of the Insured, the said value shall be paid to the estate of the Insured."

PLAINTIFF'S EXHIBIT NO. 2.

Plaintiff's Exhibit No. 2 is a Certificate of Renewal, Five Year Level Premium Term Insurance, showing that the contract sued upon was renewed for a period of five years on July 1, 1932.

4264

PLAINTIFF'S EXHIBIT NO. 3.

Plaintiff's Exhibit No. 3 is as follows:

U. S. Veterans Bureau Form 742.

Application for Reinstatement of Yearly Renewable Term Insurance.

Applicant must fill out and sign the first page of application for reinstatement in every case. If insurance has lapsed for more than three months, including the grace month, the report of the Medical Examination on reverse side of this form is also required.

1. My Name in Full: Lawrence W. Pence. 2. Certificate No. T-3674111c

3. My Home Address. National Home, Wisconsin. Mailing Address: Same.

4. I hereby apply for the reinstatement of \$10,000 Term Insurance granted to me under the provisions of the War Risk Insurance Act, or the World War Veterans' Act, 1924, now lapsed on account of the nonpayment of the premium for the month of June, 1920, within the grace period of 31 days. As a condition to the reinstatement of this insurance, I do hereby certify that the answers to the following questions are true to the best of my knowledge and belief, and are made as of the day on which the application is submitted to the Bureau or deposited in the United States mail.

5. Are you now in as good health as you were at the due date of the premium in default? Yes.

6. Are you now permanently and totally disabled? (Answer "Yes" or "No".) No.

7. Have you been ill, or contracted any disease, or suffered any injury, or been prevented by reason of ill health from attending your usual occupation, or consulted a physician in regard to your health, since lapse of this insurance? (Answer "Yes" or "No".) No. If so, give dates and full particulars, including the name and address of physician.

8. Have you ever made application for (a) Government compensation? No. (b) Training allowance? If so, give Claim No. C. For what disability?

9. I desire this reinstatement to be effective as indicated by check below:

☐ The First Day of the Month in Which Requirements Have Been Complied with, or

☒ The First Day of the Following Month.

Regulation 14 provides that Term insurance shall be reinstated effective from the first day of the month in which the requirements are complied with by the applicant, or, upon his written request made during such month, from the first day of the following month.

Effective July 1, 1927.

427 10. Premiums Tendered with Application.

(a) For first month of lapse	\$ 8.40
(b) For month of Reinstatement of Term Insurance	\$
(c) Advance premium on Term Insurance	\$
(d) For first payment on \$10,000 Government (converted) insurance	\$13.50
Total	\$21.90

Remitted by (Check)
(Draft)
(M. O.)

Use (b), (c), (d), as they apply to your case.

Signed at National Home, Wisc. on this 21 day of June, 1927.

Lawrence W. Pence.
(Signature of Applicant)

Witness:
Charles W. Fisk.

For Central Office Use Only.
(Do not write in this space)

Received

Approved

Rejected

Insurance Medical Section:

Reinstated.

Corrected Receipt Issued.

(Date)

(Initials)

(Date)

(Initials)

The law provides that "Whoever . . . makes any statement of a material fact knowing it to be false, shall be

guilty of perjury and shall be punished by a fine of not more than \$5,000, or by imprisonment for not more than two years, or both."

This Application Should Be Deposited in the United States Mail Immediately After Execution.

428

Medical Examination.

(This examination is necessary only where insurance has lapsed for a period of more than three months.)

1. Applicant's Own Statement.

1. Date of birth: Aug. 22, 1876.
2. Place of birth: Mason City, Iowa.
3. Race: White.
4. Single, married, or widowed: Married.
5. Family Record:

Father: Age at death: 98. Cause of death: Old age.
Yr. of death: 1925.

Mother: Age of death: 76. Cause of death: Cancer.
Yr. of death: 1905.

Sister: Age if living: 70. Health: Good.

Sister: Age if living: 65. Health: Good.

Sister: Age if living: 60. Health: Good.

Sister: Age if living: 56. Health: Good.

Brother: Age if living: 54. Health: Good.

Sister: Age at death: 36. Cause of death: Childbirth.
Yr. of death: 1895.

Sister: Age at death: 40. Cause of death: Peritonitis.
Yr. of death: 1895.

Brother: Age at death: 32. Cause of death: Tuberculosis.
Yr. of death: 1896.

6. What operations have you had? Describe fully, giving dates. No.

7. Have you ever used wines or liquors to excess? No.

8. Have you ever used opium, morphine, cocaine, or other habit-forming drugs? No.

9. What is your occupation? Doctor of Medicine.

10. Are you now in good health? Yes.

11. Have you ever been treated for any disease of brain or nerves No, throat or lungs No, heart or blood vessels No, stomach, liver, intestines No, kidney or bladder No, genito urinary organs No, skin No, glands No, ear or eye

No, bones No. (Answer each "Yes" or "No". If "Yes" describe fully and give dates.)

Signed by applicant in the presence of Medical Examiner
this 21 day of June, 1927.

Lawrence W. Pence.
(Signature of Applicant)

429 2. Medical Examiner's Report.

(Examination not acceptable if made by a relative of applicant.)

1. Height in shoes: 5 ft., 6 in.
2. Weight, coat and vest off: 168 lbs.
3. Girth of chest, normal 39 in.
Forced expiration 38 in.; forced inspiration 42 in.
4. Girth of abdomen: 38 in.
5. State Pulse Rate:

- (a) Before exercise 76. (b) Immediately after 90.
- (c) One minute after 80. (d) Two minutes after 78.
6. Blood pressure (see Note): Systolic 130. Diastolic 70.
7. Instrument used Tycos.

8. After examination do you find any abnormality of the heart? No. It is irregular? No. Does it intermit? No. Is there a murmur? No.

(If any heart disability is found or suspected, complete Special Heart Examination on reverse side.)

9. Has applicant's weight increased recently? No. Diminished No. If so, state cause, how much, and within what period.

10. After examination, do you find any abnormality of the lungs? No.

(Afternoon temperature is required in slender person with suspected tuberculosis tendency or with suspicious signs.) Obtain a careful history of every so-called pleurisy case with special reference to duration, effusion, and what disease it followed. Record the facts here. If tuberculosis is found or suspected, complete the Special Tuberculosis Examination on reverse side.

11. After an examination do you find any abnormality of the nervous system? No. Skin? No. Ear? No. Eye? No. Abdomen? No or digestive system? No. (Answer each "Yes" or "No". If "Yes" describe fully.)

11. Urinalysis: Specific gravity 1018. Albumin None. Casts None. Reaction Acid. Sugar None. Test used Haines.

Have you knowledge that the urine examined was passed by the applicant the time of examination? Yes.

12. Has applicant ever had syphilis, gout, or rheumatism? No.

13. Any defects in the sight or hearing? No.

14. Any deformity or departure from normal in any respect? No.

15. Has the applicant lost an eye, hand or arm, foot or leg? No.

16. Is the ability to work impaired in any way? If so state particulars No.

17. Is the applicant ruptured? No. Is it reducible? Is a suitable truss worn?

18. How long have you known applicant? 3 yrs.

By what means are you satisfied as to the identity of the person examined? Old acquaintance.

Give some mark of identification. None.

19. Are you related to applicant? No.

430 20. Was this examination made at your home or office, or at applicant's home? State place and address. Office.

21. Do you recommend acceptance of the risk? 1st Class Risk Yes. Fair Risk Poor Risk

22. Are answers to questions of medical examination in your own handwriting? Yes.

23. Females: (Not pertinent as applicant is a male.)

24. Are you satisfied that everything has been fully stated regarding the physical condition, habits, personal and family history of the applicant?

25. Remarks:

Examination of (Lawrence W. Pence) L. W. Pence made and signed this 25 day of June, 1927.

Jos. H. Plant,

(Signature-Official designation)

National Home, Wis.

(Address)

Indiana & North Dak.

(Name of State in which you are licensed to practice medicine.)

Notes.—Blood pressure is required (a) when applicant is more than thirty years of age, (b) in all cases where

174 *Defendant's Exhibit 1 and Plaintiff's Exhibit 4.*

there is a family history of apoplexy, heart disease, or nephritis; or where there is a personal history of gout, rheumatism, syphilis, heart disease, or any evidence of kidney disease.

The law provides that "Whoever . . . makes any statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than \$5,000, or by imprisonment for not more than two years, or both."

431 DEFENDANT'S EXHIBIT "I" AND PLAINTIFF'S EXHIBIT NO. 4.

Defendant's Exhibit "I" and Plaintiff's Exhibit No. 4 is as follows:

U. S. Veterans Bureau Form 739

Application for United States Government Life Insurance in accordance with the provisions of the World War Veterans Act, 1924, as amended, and Bureau regulations.

1. Name: Lawrence W. Pence.
2. Residence: Veterans Administration, Wis.
3. I was born at: Mason City, Iowa, Aug. 22, 1876.
Age nearest birthday: 56.
4. Did you serve in the military or naval forces of the U. S. in the course of the World War? Yes.
5. Bank and organization at time of discharge: 1st Lt., 56th Mach G.B'n, 19th Div. Date of Enlistment: 9/1/18. Date of Discharge: 1/9/19.
6. Amount of insurance applied for: \$10,000.
7. Plan of insurance applied for: 5 CT (convertible term).
8. I will pay premiums as indicated: Monthly—\$18.90.
9. Do you apply for total disability benefits for which an extra premium is required?
10. I request that the effective date of this policy be made the first day of, 19.....
11. Full name of beneficiary: Mrs. Harriet Vera Pence—Wife. Amt. of ins. for each beneficiary: \$10,000. Post Office address: Veterans Administration, Wis.
12. I desire the proceeds of this policy paid in the event of my death under the following optional settlement indicated by cross mark X below. No. 1 (X) one sum.

13. Have you ever applied for (a) Government compensation Yes. (b) Training allowance (c) Government insurance Yes. (d) Pension If so, give reference numbers:

14. Has any application for insurance on your life ever been declined? No. Has a policy been offered with plan or amount different from policy applied for? No. (c) Has a policy been offered at a premium rate higher than the standard at your age? No.

15. I inclose herewith remittance payable to the Treasurer of the U. S. by in the amount of \$.....

Signed at Milwaukee, Wis. on the 29th day of June, 1932.

Witnessed by H. Senn.

Lawrence Waldo Pence
(Applicant sign here)

Received Aug. 22, 1932,

Address Veterans Administration, Wis.

The law provides that "Whoever * * * makes any statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than \$5,000, or by imprisonment for not more than two years, or both."

432

PLAINTIFF'S EXHIBIT NO. 8.

Plaintiff's Exhibit No. 8 is as follows:

United States Civil Service Commission

Application for Examination

Kind of examination: Medical G. A.

Name: Lawrence W. Pence.

City: State Center, Ia.

State: Iowa.

Residence: State of Iowa.

County of: Marshall.

Date of birth: Aug. 22, '79. Age on last birthday: 45.

Height: 5 ft., 6 in. Weight: 161 lbs.

Applicant will not fill the following.

Application: Dec. 16, 1924. Approved: H. M. T.,
192.....

Notified of standing: Jan. 16, 1925.

Entered register: Jan. 16, 1925.

N 357

D.M.J.

Preference Allowed—C. S. Comm.

Form 2415

Aug., 1923

Preference: Military Service.

M. 1918-1919 A (a) Vet. Bu.

Average percentage: 88.50.

Application number: 723221. Selection number: 270612.

Notice to Applicants.—Any false statement in an application, or alteration of a voucher or certificate, or the presentation to the Commission of a paper containing such false statement or alteration is a violation of the law and punishable as such.

1. Use this blank only when specified in examination announcement.

2. Answer All questions fully in ink.

3. Remember that All your answers are under oath.

4. Avoid reference to religion, politics, or fraternal order.

5. There must be no discrepancy in statements made, in manner of writing your name throughout application and in "Officer's Certificate."

To the United States Civil Service Commission, Washington, D. C.

I, the undersigned, hereby apply to be admitted to the examination named above, intending to accept appointment if selected.

1. Are you a citizen of the United States? Yes. Date of birth: Aug. 22, 1879. Age on last birthday? 45 years. Place of birth: Iowa.

2. (a) In the space below, give a detailed statement of your education, including dates:

Grammar school: From Sept., 1886 to June, 1890.

High School: From Sept., 1890 to June, 1894.

College or University: From Sept. 1894 to June 1898.

Degrees conferred: B.S.M.I. University of Iowa, Ia.
Cy., Iowa.

433 (b) If you have pursued any postgraduate courses of study, state fully what studies and when, where, and for what length of time they were pursued.

One school year, Post grad. in medical specialty.

3. Submit a complete statement of your experience. State when (with dates), where, and by whom you were employed, the compensation received, and the specific nature of your duties in each case. Every line of work in which you have been employed must be included in your statement.

26 years in general practice of medicine combined with special work on Eye, Ear, Nose, & Throat.

Insurance examiner. Board of health work.

One year Asst. at Venton, school of the blind.

One year intern State Hospital, Iowa City, Ia.

4. (a) What is the lowest entrance salary you would be willing to accept? \$250.00 per month with maintenance.

(b) Would you be willing to accept temporary appointment? Yes. If so, at what salary? \$250.00 per mon.

434 Have you now or have you ever had any of the following disabilities? (Answer "Yes" or "No" to each inquiry; in case answer is "Yes" describe fully under question 6.)

Sore eyes or any defects of vision in either eye? No.

Any defects of hearing in either ear? No.

Any trouble in hearing ordinary conversation readily? No.

Any defect of speech. No.

Any injury, deformity, or defect of hand, arm, foot, or leg? No.

Fallen or misplaced arch of foot impairing efficiency? No.

Tuberculosis in any form? No.

Asthma or shortness of breath? No.

Any chest, lung, throat, mouth, or nasal disease? No.

Any skin eruption? No.

Tumors, sores, ulcers, enlarged veins? No.

Rheumatism? No.

Paralysis? No.

Piles? No.

Rupture? No.

If ruptured, is rupture retained by well-fitting truss?

Difficult urination; immoderate flow of urine; bladder or kidney disease? No.

•Are you subject to headache-severe, protracted, or frequent? No.

Convulsions or fits? No.

Nervous exhaustion or mental derangement? No.

Palpitation or any disease of the heart? No.

Dyspepsia? No.

Do you wear glasses? No.

6. Describe fully here all diseases, disabilities, defects, or infirmities which you now have or may have had in the past. If suffering from same at present, so state; if not, state when and for what length of time.

7. (a) Were you ever in the U. S. military or naval service? (Answer "Yes" or "No", and see note below) Yes.

In what company and regiment, or on what vessel, or where else? (Do not give service in militia.) 19th Div., 56th N. G. N. Camp Dodge, Ia.

Give exact name under which enlisted and discharged. Lawrence W. Pence.

7. (b) Dates of each enlistment and discharge from U. S. Military or Naval service. Enlisted July 1918; Discharged Feb., 1919.

Was enlistment in each case terminated by honorable discharge? Yes.

8. What has been your place of abode and principal business or occupation for each of the past four years? Year 1920 — 1921 — 1922 — 1923 — 1924: State Center, Ia.—Physician.

9. Are you now in the employ of the U. S. Government: No.

10. Were you ever employed in any branch of the U. S. Government: No.

11. Have you ever filed an application with this Commission or its representative for any branch of the U. S. Government service? No.

12. Have you ever been barred from examination by this Commission? No.

13. Have you ever been discharged from a position under the U. S. Government or under a State, county, city, or local government, or from private employment? No.

14. (a) Have you ever been arrested or charged with any offense against law or police regulation; or have you ever forfeited collateral, or been fined or convicted
435 on account of any misdemeanor or offense? No.

(b) Does your answer to (a) above cover all cases therein referred to: Yes.

15. (a) State in each case whether or not you have ever used any of the following, and, if so, to what extent: Whisky: No. Wine: No. Beer: No. Other intoxicating liquor: No. Opium, morphine, or other narcotic drug: No.

436 Give the names and addresses of five persons, preferably employers, who have knowledge of your character, experience, and ability.

1. W. J. Liston, State Center, Ia.

2. Earnest, Rhodes, State Center, Ia.

3. Fred Gilbert, State Center, Ia.

4. Frank Hynet, State Center, Ia.

5. Dr. I. D. Koutman, State Center, Ia.

17. (a) Are any members of your family or relatives (either blood or by marriage) in any part of the U. S. Government service whatsoever? Yes. If so, furnish the information required below in regard to all such relatives.

Byron Richardson, Emmetsburg, Ia., Position: R. R. mail clerk. Relationship: Cousin—married.

(b) Does your answer above cover all your relatives in the U. S. Government service? So far as I know.

18. In what State or Territory have you actual bona fide residence? Iowa. Length of such residence therein? From Aug. 1879 to Nov. 1924. In what county have you actual bona fide residence: Marshall Co., Ia. Length of such residence in county: From Aug. 1898 to Nov. 1924.

19. If you have not resided continuously in the State or Territory in which you claim actual bona fide residence, or are not now actually living in such State or Territory, answer the following questions fully.

(a) For what periods have you been absent therefrom, giving dates? One year in California 1912-13.

(b) Where were you and what was your occupation during such time? Not occupied.

(c) What are your intentions as to returning to the State or Territory in which you claim actual bona fide residence?

(d) What are the facts on which you base your claim to actual bona fide residence in the State or Territory claimed? Place of birth—continued residence.

(e) What is the name, address, and relationship of the person, if any, with whom you make your home at the present time in the State or Territory in which you claim bona fide residence? Married, live with my family.

(f) Are you now a voter in such State or Territory? Yes.

20. Are you now married? Yes.

I solemnly swear that the answers I have made to each and all of the foregoing questions are full and true, to the best of my knowledge and belief. So Help Me God.

(Signature of applicant) Lawrence W. Pence.

437 This Application Will Not Be Accepted If the Jurat or Oath, or the Officer's Certificate When Required, Is Omitted.

Jurat, or Oath.

(Under the provisions of the civil service act and rules, an application for examination must be made under oath, in such form and manner and accompanied by such certificates as the Commission may prescribe. The following oath may be taken at any place in the United States most convenient to applicant, before any Notary Public, or other officer authorized to administer oaths for general purposes, and before whom the applicant must appear in person and make oath to all the statements made by him in his application. The officer's signature must be authenticated by official (impression) seal. If the oath be taken before a justice of the peace or other officer who has not such seal, his official character must be certified by the clerk of court, secretary of state, or other proper officer, under official seal.)

Subscribed and duly sworn to before me according to law by the above-named applicant, this 3 day of December, 1924, at State Center, County of Marshall and State of Iowa.

(Signature of officer) Albert Anseline,
(Official Impression Seal) Notary Public.

Officer's Certificate.

This certificate is required of applicants for positions in the apportioned Departmental Service at Washington, D. C.

This certificate must be executed by a notary public, county, municipal, or police-court clerk, mayor, justice of the peace, or other officer in the county or city in which the applicant claims residence, provided the officer has an official (impression) seal, or, in lieu thereof, that his official character is certified to by proper officer, under official (impression) seal, and provided he is an actual resident and officer in the same county or city claimed by the applicant.

Applicants who occupy positions in the apportioned Departmental Service at Washington are not required to have this certificate executed, but should make the following notation opposite it: "Am in the apportioned Departmental Service."

The applicant is not required to appear in person before the officer who executes the following certificate, but the officer should satisfy himself as to facts to which he certifies, from credible and competent evidence.

I, a Notary Public, of the county of Marshall and State of Iowa, do hereby certify that Lawrence W. Pence, the applicant, who signs the above application for civil service examination, is now an actual bona fide resident of the county of Marshall and State of Iowa, and has been such resident for ten years months next preceding the date hereof.

Dated at State Center, county of Marshall, and State of Iowa this 3 day of December, 1924.

(Signature of officer) Albert Anseline,

(Official Impression Seal)

The official seal must not be omitted. Any addition or alteration in the printed wording will nullify the certificate.

438

Medical Certificate.

This medical certificate is required only when the examination announcement so specifies. The certificate must be filled out by some practicing physician after a thorough examination of the applicant.

Height (without shoes) 56 inches.

Weight (males without clothing) 161 pounds.

(Measurements to be made by physician.)

Vision: Uncorrected, R 20/20 L 20/20 (Snellen type at distance 20 feet).

Hearing: Ordinary conversation heard at Fifty feet.

Examiner should consider and report on: Sight; hearing, speech; insanity; epilepsy; locomotor ataxia; heart disease; tuberculosis; lung disease; Bright's disease; diabetes; venereal disease; cancer; rheumatism; paralysis; deformities or mutilations of hand, foot, arm, leg, or fingers, etc.

Describe fully any deviations from the normal, with their effect on function. If present:

Valvular heart diseases, is it fully compensated? None.

Arrested tuberculosis, how long arrested? None.

Hernia, is it retained by a well-fitting truss? None.

"Flat foot", does it interfere with function and to what extent? None.

If applicant receives pension, compensation, or training for disability incurred in the military service, describe disability and state present condition.

Do you believe the applicant physically and mentally capable of performing the duties of position sought? Yes.

I certify that I have made a thorough examination of the applicant named herein, that each and all of the above answers are in my own handwriting and are true, and that the applicant wrote his signature, just below, in my presence.

(signature of physician) Royal F. French

(P. O. address of physician) Marshalltown, Iowa

Date Nov. 29, 1924

(signature of applicant) Lawrence W. Pence.

(This space is to be filled in by the applicant in own handwriting, in the presence of the physician.)

439

Lawrence W. Pence

Applicant must write name above

Sioux Falls, South Dakota.

Sex: Male Date of birth: August
22, 1879.

Rolled print right
forefinger

(Use fingerprint
indelible pad).

Height: 65½ inches Weight: 165 (in clothing) lbs.
Weight 157 (without clothing) lbs.

Items checked (x) were examined and found normal.
Deviations from normal are noted.

1. Eyes: For distance; with glasses if worn: Right 20/
left 20/ Without glasses: Right 20/20 Left 20/20. Evi-
dence of disease or injury: Right: None Left: None.

2. Ears: Is conversational voice heard at 20 feet?
Right: 20-20. Left: 20-20.

3. Nose: Negative.

4. Mouth: Negative.

5. Throat: Negative.

6. Thyroid (especially in women): Negative.

7. Heart: Negative.

8. Lungs: Right—Negative. Left—Negative.

9. Inguinal rings (men only): Right—Negative. Left
—Negative.

10. Varicose veins: No.

11. Flat foot: No.

12. Deformities or atrophies worthy of note: None.

13. Scars of serious injury or disease: No.

14. Urinalysis.

15. Give here a supplemental and complete descrip-
tion of every abnormality, disease, or physical defect, past
or present: None.

16. Has applicant ever received pension, compensation,
or training because of disability received while in military
or naval service? No.

17. Considering your findings in this examination, and
the duties of the position of (Fill in kind of position
sought) United States Vet. Bureau.

What is your opinion of the physical ability of the appli-

cant to perform the duties? Physically able to carry on the duties of this office.

A. R. Pearce

(Name of Examining Physician)

Acting Regional Medical Officer.

(Title and Branch of service)

Sioux Falls, South Dakota,

March 13, 1925.

The examining physician must be in the Federal service.

This report is to be returned to the official of the U. S. Civil Service Commission requesting the examination.

440

PLAINTIFF'S EXHIBIT NO. 9.

Plaintiff's exhibit No. 9, the records of the office of the Adjutant General of the Army, with respect to the military service of Lawrence W. Pence, show his enlistment and discharge on dates stipulated by the parties, and that he was found, by examining physicians, to be in good health at the time of enlistment and at the time of discharge from military service.

441

PLAINTIFF'S EXHIBIT NO. 10.

Plaintiff's Exhibit No. 10 is a report of physical examination of the insured, made at Milwaukee, Wisconsin, October 10, 1928 by Drs. Edward R. Ryan and Henry J. Kuhn. The pertinent portions of this exhibit are as follows:

"9. Present complaint (subjective symptoms, not diagnosis):

Sinusitis. Heart trouble. Shortness of breath on exertion. No precordial pain. No oedema."

"Physical examination continued (nose and throat; sinuses; heart; gastro-intestinal; surgical; orthopedic, etc); Examination by Dr. Edward R. Ryan:

The tonsils are of the buried type. No free pus was expressed. Anterior pillars and pharynx show no congestion. Nasal mucous membranes are not reddened and there is no pathologic secretion on either side of the nose. There is a high deviation of the septum to the left and a good sized spur low down on the left side. Good breathing space on

both sides of the nose. Turbinate bodies are normal in size and appearance.

X-Ray shows all sinuses clear.

Diagnosis: Deviation of the Nasal Septum.

Examination by Dr. Kuhn:

Weight 162. Height 65. Pulse 84 at 10:30 AM. Blood pressure 138/90. Head, neck, eyes: negative. Ears, nose and throat: special examination. Teeth: negative. Chest is well formed. Lungs: negative. Heart: Not enlarged, not displaced, regular. Apex beat normal, not palpable. No murmur. Myocardial tone is poor. Sounds poorly sustained. Exercise 30 hops. No murmur. No improvement in tone, regular. Rate at rest is 84, after exercise 100, after two minutes 88. Blood Pressure 138/90. Abdomen, anal and genital regions: negative.

Diagnosis: Lessened Myocardial tone and reserve. Myocardial Degeneration beginning.

'My answers to Question 9 have been read to me and I hereby certify that the complaints herein recorded are all that I am suffering from to my knowledge.

Lawrence W. Pence.

442

PLAINTIFF'S EXHIBIT NO. 13.

Plaintiff's Exhibit No. 13 is a report of physical examination of the insured, made at Milwaukee, Wisconsin on June 3, 1929 by Drs. Edward R. Ryan, Henry J. Kuhn and George A. McBride. The pertinent portions of this exhibit are:

"9. Present complaint (subjective symptoms, not diagnosis):

Claimant states that his chief complaints are: ethmoiditis and sinusitis. Says he is short of breath. His myocarditis is not so bad. Says that the dripping down in his throat caused a stomach ulcer. (That's on record in the Sioux Falls, S. D. Office. Had a G. I. series made when he was working with the Bureau.

Special Heart Examination by Dr. Kuhn:

Complaints: Claimant makes no particular complaints except that he is very short of breath on exertion.

Examination: There is no objective evidence of respi-

ratory or circulatory distress. Heart is not enlarged, not displaced, action regular. Apex beat is not unusually forceful, or heaving. Myocardial tone is fairly good. Sounds fairly well sustained. No unusual accentuations. Exercise fifty hops elicits no dyspnea or cyanosis. Tone continues good. No murmur, no thrill. Rate at rest is 80, after exercise 96, after two minutes 80. Blood pressure 130/90.

Diagnosis: No definite cardio-vascular disease noted.

Examination by Dr. Edward R. Ryan, E. E. N. T. Spec. June 3, 1929.

Anterior pillars and pharynx are slightly congested. Tonsils are small, of the buried type and infected. No free pus was expressed. Deviation of the septum to the right and a good sized ridge low down on the right side. Nasal mucous membranes are normal. Turbinate bodies are not turgescient and there is no pathologic secretion on either side of the nose.

Diagnosis: Tonsillitis, chronic. Deviation of the Nasal Septum.

443 General Examination by Dr. McBride.

General appearance: well nourished and developed. Weight 163. Height 66½. Pulse 80. Temperature 98.6 AM. Blood pressure 130/90. Head and neck: negative. Eyes, ears, nose and throat: special report. Teeth: see dental report. Chest and lungs: Excursion is full, free and symmetrical. All breath sounds are normal. No rales heard. Heart: see special report.

Abdomen: Gives history of duodenal ulcer. For the past three years has had no complaint except chronic constipation. Examination shows gastropptosis. No pyrosis or meteorism. States he is careful with diet. Depends on fruits for constipation. No tenderness or rigidity. Wears belt for gastropptosis, support.

Extremities: negative. Skin, glands and reflexes: negative.

Diagnosis: Chronic Constipation. Gastropptosis.

My answers to question 9 have been read to me and I hereby certify that the complaints contained therein are all that I am suffering from to my knowledge.

Lawrence W. Pence.

444

PLAINTIFF'S EXHIBIT NO. 14.

Plaintiff's Exhibit No. 14 is a report of physical examination of the insured made at the National Home, Wisconsin, November 12, 1930 by Dr. C. O. Diamond. The pertinent portions of this exhibit are:

"8. Brief outline of claimant's disability since service: Disability since service: Sinusitis began during service and has continued since, never had hospitalization during service nor after service. Began to have trouble with stomach in 1923. Noticed first pain in epigastrium, not especially related to meals, vomiting and bloody stools. In 1925 had G. I. series at Sioux Falls, S. D. Veterans Bureau hospital and found duodenal ulcer. Medical treatments since. Had myocarditis 1st year after service, shortness of breath on mildest exertion, passed away.

9. Present complaint (subjective symptoms, not diagnosis): (See bottom of 4th page, this form, for claimant's certification of fullness of answer to question 9. The examiner will acquaint the claimant with this requirement prior to noting complaints.)

Still troubles with constant frontal headache and dripping from throat with bloody muco purulent discharge, still has pains, always present in stomach and pain in epigastrium, heavy feeling two-three hours after meals, lot of belching of gas, sour eructations, no vomiting, no tarry stools, still short of breath on exertion.

Physical examination continued (nose and throat, sinuses; heart (see Marginal Note 1): gastro-intestinal; surgical; orthopedic, etc.):

Head normal in size, marked tenderness over both eyes along frontal bone. Eyes—pupils equal and regular, react to light and accommodation. Ears normal, nose—Mucus membrane congested, some slight discharge present in both nasal passages. Mouth normal, teeth in good condition, throat clear. Neck—thyroid normal in size, no tracheal tug. Lungs—good expansion, Palpation—tactile fremitus normal, undulatory motion normal, costal margins move outward and equally. Percussion—normal resonance throughout. Auscultation—breath sounds vesicular, no rales. Heart—slightly enlarged to left, no abnormal precordial activity, sounds faint, but no murmurs.

Recumbent: Pulse 78, regular, blood pressure 130-90; pulse pressure 40.

Standing: Pulse 96, regular, blood pressure 138-95, pulse pressure 43.

Immed. after exercise: Pulse 108, blood pressure 150-100, pulse pressure 50, rhythm reg.

After 3 min. rest: Pulse 84, regular, blood pressure 140-90, pulse pressure 50.

Abdomen—marked tenderness in epigastrium, no masses. Liver, spleen and kidneys not palpable. Sexual organs normal. Bones, muscles and joints normal; Nervous system—reflexes equal and active. Accessory sinuses (see above). Inguinal rings normal.

(signed) Dr. C. O. Diamond.

445 X-ray findings:

11-14-30 Examination of the stomach reveals no pathology involving it; the cap of the duodenum is ragged and its upper most portion is flat. No filling defect is noted involving it. At the 6th hour there is some ilial retention and the meal has reached the transverse colon and at the 24th hour spastic changes are noted thruout the colon which is empty at the 48th hour except for a slight amount in the appendix which is also noted at the 72nd hour.

Conclusion: Possible duodenal ulcer.

Chronic appendicitis.

Examination of the accessory nasal sinuses reveals them as being normal.

(signed) Dr. Glickman.

X-ray examination (give date, place, authorship, interpretation): See above.

Laboratory findings (may be copied from original laboratory report): Urinalysis—negative.

General diagnosis (based on entire physical condition):

Sinusitis frontal, chronic mod. severe. Perm.

Ulcer duodenal, mod. severe. perm.

Myocarditis, chronic, mild perm.

Appendicitis, chr. X-ray diagnosis—perm.

Statement by Claimant.—My answers to Question 9 have been read to me, and I hereby certify that the complaints therein recorded are all that I am suffering from to my knowledge.

(The examining physician will read complaints noted in answer to Question 9 before the claimant's signature is affixed.)

Signed Lawrence Waldo Pence.
(Signature of claimant.)

446

PLAINTIFF'S EXHIBIT NO. 15.

Plaintiff's exhibit No. 15 is a report of physical examination of the insured made at U. S. Veterans Hospital, Waukesha, Wisconsin on May 27, 1931 by Dr. A. E. Minsky. The pertinent portions of this exhibit are:

"8. Brief outline of claimant's disability since service: Prior to service practiced medicine, making about \$7000 or \$8000 a year. After service returned to prewar occupation and has worked steadily up to the present time. Now is working at the National Home making \$3800 a year. Has been troubled with duodenal ulcer; appendicitis, chronic; myocarditis, sinusitis and ethmoiditis, chronic, ever since service.

9. Present complaint (subjective symptoms, not diagnosis): (See bottom of 4th page, this form, for claimant's certification of fullness of answer to question 9. The examiner will acquaint the claimant with this requirement prior to noting complaints.) Frontal headaches, dyspnoea, weakness, loss of weight. Bloating, gnawing pain in epigastrium. History of fatty stools.

Physical examination continued (nose and throat, sinuses; heart (See Marginal Note 1); gastro-intestinal; surgical; orthopedic, etc.):

Nose: Septum deviated. Some muco-purulent discharge from below middle turbinate.

Throat: Normal.

Sinuses: Tenderness over both supra-orbital notches. Transillumination negative. Impression: Frontal sinusitis.

Neck: No palpable glands.

Heart: Apex beat within nipple line. Rate regular. Sounds weak and distant. First sound roughened. Pulse rate 84. Impression: Chronic myocarditis.

Abdomen: Somewhat obese. Moderate tenderness and rigidity 4 dm. above navel. Tenderness over McBurney's point. Impression: Chronic duodenal ulcer. Chronic appendicitis.

Extremities: Normal.

Reflexes: Active.

X-ray examination (give date, place, authorship, interpretation): G. I. Impression:—Chronic appendicitis. Multiple diverticula of colon.

X-ray of sinuses:—Some increased density inferior por-

tion left maxillary sinus. (Signed)—C. W. Stevens, Roentgenologist. Laboratory findings (may be copied from original laboratory report): Urinalysis: Amber color. Acid reaction. Sp. gr. 1.022. Trace of albumin. Negative sugar. Moderate amount mucus. 1 plus pus. Moderate number squamous epithelia.

General diagnosis (based on entire physical condition): Sinusitis, frontal, moderate, permanent.

Ulcer, duodenal, chronic, moderate, permanent.

Appendicitis, chronic, moderate, permanent.

Myocarditis, chronic, moderate, permanent.

Deviated nasal septum, moderate, permanent.

447 Statement by Claimant.—My answer to Question 9 have been read to me, and I hereby certify that the complaints therein recorded are all that I am suffering from to my knowledge.

(*The examining physician will read complaints noted in answer to Question 9, before the claimant's signature is affixed.)

Signed Lawrence W. Pence.

(Signature of claimant.)

448 PLAINTIFF'S EXHIBIT NO. 16.

Plaintiff's exhibit No. 16 is a roentgenological report of an examination made of the insured on July 22, 1931 by Dr. G. W. Stevens. The pertinent portions of this exhibit are:

"X-ray of fluoroscopic findings: Impression: Chronic appendicitis. Multiple diverticula of colon.

Some increased density inferior portion left maxillary sinus.

—OWS.

449 PLAINTIFF'S EXHIBIT NO. 17.

Plaintiff's exhibit No. 17 is a roentgenological report of an examination made of the insured on August 2, 1934 by Dr. L. Grant Glickman. The pertinent portion of that exhibit is as follows:

"X-ray of fluoroscopic findings: Copy of X-ray report of May 22, 1934. Examination of the accessory nasal sin-

uses in three positions reveals a veiling capacity involving the lower portion of both maxillary sinuses and the right frontal sinus."

450

PLAINTIFF'S EXHIBIT NO. 18.

Plaintiff's exhibit No. 18 is a report of a general medical and special cardiac examination of the insured, made at the Edward Hines, Jr. Hospital, Hines, Illinois, covering a period of hospitalization of the insured commencing February 27, 1933. The pertinent portions of that exhibit are as follows:

"1. Present Complaints. Headaches quite frequently. Complains of distressed feeling in upper part of abdomen, for 7 years. States the pain comes on any time. Has gas pains at night. States relief is obtained only by belching. Food and soda does not give relief. Nausea, but no vomiting. About February 1933 had pain in abdomen, and noticed blood in stools. Was in bed for about 4 days. States that rough vegetables, lettuce, cauliflower, radishes, cucumbers, pickles cause much distress. States in last few days has had pain following bowel movement (in rectum). Breakfast: Soft-boiled eggs; coffee; orange or tomato juice. Lunch: 2 soft-boiled eggs; coffee, toast. Supper: Chopped meat, coffee, some vegetables (peas). No recent loss, of weight. Constipated—takes laxative every other day. Hurting over the heart. Shortness of breath on exertion. States he had hemorrhage in July 1932.

I certify that the above complaints are all that I am suffering.

Signature Lawrence W. Pence.

6. General Appearance: Well developed well nourished adult white male who does not appear acutely ill. Temp. 98.—Wt. 150#—Ht. 65".

Physical Findings are Negative Save for the Following:
Sent: See special Nose and Sinus exam.

Lungs: No change in resonance, fremitus or auscultation.

Heart: Apex impulse is not palpable or visible. LHB is 8½ cms. to the left of MSL. RHS is 3 cms to the right of MSL. Basal dullness is not increased. Pulses are equal, small, regular, and synchronous with the heart beat. Radial arteries are soft and compressible. No murmurs. Heart tones are normal. Pulse (recumbent)—88. BP: 160/98. Pulse (erect) 88. BP: 142/90. Pulse (after exercise) 100.

Slight dizziness. No cyanosis or vertigo. BP: 156/96. Pulse (2" after exercise) 92. BP: 160/98.

Abdomen: Well nourished. Liver, spleen and kidneys are not palpable. No rigidity. There is tenderness throughout the abdomen, especially marked over the epigastrium and the upper left quadrant. No scars. No abnormal palpable masses.

Extremities: No edema.

8. Laboratory Findings: Urinalysis: Negative.

Fecal Analysis: Color, brown, Consist. soft. Otherwise negative.

451 Blood Count: Red corp. 5,200,000. White corp. 11,200. Polys 71%. Sm. Mono 20%. Lg. Mono 6%. Eosinophiles, 3%. Hemoglobin, 85%.

X-ray G. I. Tract: Opaque meal passes the esophagus without resistance. The stomach shows no evidence of abnormality. The duodenal bulb shows persistent deformity. The roentgenological examination confirms the fluoroscopic findings showing a normal stomach and deformity of the duodenal bulb. There is no 5 hour gastric residue. The colon is normal. The gall-bladder is not visualized if the patient has symptoms of Cholecystic Disease recommend further check-up of this region after an intravenous administration of iodeikon.

Summary: — Duodenal Ulcer. Gall-Bladder undetermined.

Diagnosis:—1. Heart Disease.

- A. Etiological—Unknown.
- B. Anatomical—Myocarditis, Chronic, Slight.
- C. Physiological—Hypertension, Arterial, Slight.
- D. Functional—2a Able to carry on slightly diminished physical activity.

2. Duodenal Ulcer, Moderate Activity.

3. Constipation, Chronic, Moderate.

Remarks: Gastric Analysis not performed because of history of recent gastric hemorrhage. Iodeikon test not performed as symptoms are more in accord with a diagnosis of duodenal ulcer. In all probability there are adhesions between the duodenum and gall-bladder, which is responsible for non-visualization of gall-bladder.

Disposition: Sent to Registration Desk.

D. S. Levy, M. D.

Gen. Med. Exam.

Roentgenological Report:

Date: 2/28/33.

G. I. Tract:

Fluoro. Exam: Opaque meal passes the esophagus without resistance. The stomach Shows no evidence of abnormality. The duodenal bulb shows persistent deformity.

The roentgenological examination confirms the fluoroscopic findings showing a normal stomach and deformity of the duodenal bulb.

There is no 5 hr. gastric residue.

The colon is normal. The gall-bladder is not visualized, if the patient has symptoms of Cholecystic Disease recommend further check-up of this region after an intravenous administration of iodeikon.

Summary: Duodenal Ulcer. Gall-Bladder undetermined.

C. G. Lyons

Medical Officer, U. S. A.
Chief, X-ray Service.

452 Electrocardiographic Report:

Electrocardiogram No. 10237 Date 2-27-33.

Ekgm. Reading: Rhythm—Normal. Rate—86. P. R. Interval—16 sec. P upright in all leads, normal height, and appearance. QES slightly slurred in all, diphasic in II and III, not greater than 6 mms. in any. T upright in all leads, normal height and appearance.

Clinical Interpretations: Suggested Myocardial Degeneration.

Edward W. Hollingsworth

Edw. W. Hollingsworth,

Med. Off. U. S. V. B.

Roentgenological Report:

Date: 4/18/33.

Sinuses: Reviewing the sinus films dated 2/27/33 reveals the following: The lining membrane of the antra is slightly thickened. There is also haziness of the frontal cells attributed to an inflammatory process.

Summary: Sinusitis.

C. G. Lyons

Medical Officer, U. S. V. B.
Chief, X-ray Service.

453

Veterans Administration
of Milwaukee
Milwaukee, Wis. Apr. 6, 1933.

In reply refer to MO as
Pence, Lawrence W.
C-1 437 493.

Manager,
Veterans' Administration,
Hines, Ill.

Attention; Dr. A. Field, Attending EEN&T Specialist.

Dear Sir:

Under date of Feb. 27th the above named veteran, the attending eye, ear, nose and throat specialist at this station, was examined at the Hines office on his claim for disability allowance.

Report has been received from your office, and it is noted that you made the eye, ear, nose and throat examination in Dr. Pence's case. Your report is as follows,—“Fair ventilation—profuse mucous and pus discharge both nares. Marked tenderness over frontal sinuses. Mild deviated septum.” X-ray examination was also made of the sinuses, and the X-ray report is as follows,—“The roentgenological examination of the nasal accessory sinuses shows all sinuses to be clear and well serated. There is no demonstrable X-ray evidence of pathology. Sinuses normal.”

It is noted that your diagnosis in this case is “chronic catarrhal shinitis, and mild deviated septum.” Dr. Pence feels that he has a sinusitis, even in view of the negative X-ray findings. He states that he discussed this matter with you when you examined him, and that it was your opinion at the time that he had a sinusitis. This condition is service connected.

It is respectfully requested that you review your records in this case and advise us whether or not, in your opinion, even though the X-ray findings were negative, the diagnosis of sinusitis is warranted in this case.

By direction,

W. C. Lieffert, M. D.,
Chief, Out-patient Service,
Milwaukee, Wisconsin.

454

Veterans Administration.
Hines, Illinois.
April 19, 1933.

Your file reference: MO Ac
Pence, Lawrence W.
C-1 437 493.

Manager,
Veterans' Administration Facility,
Milwaukee, Wisconsin.

Attn: Chief, Out-Patient Service.

Dear Sir:

Replying to your communication of April 6, 1933, regarding Lawrence W. Pence, C-1 437 493, Dr. Field states that on reviewing the sinus films, which were taken on February 27, 1933, we find the lining membrane of the antra is slightly thickened. There is also haziness of the frontal cells attributed to an inflammatory process, which clearly indicated an active sinusitis with copious pus discharge.

Dr. Field advises that he would suggest you change the diagnosis of February 27, 1933, to:

"Chronic Frontal and Maxillary Sinusitis with Copious Discharge."

Enclosed is a copy of the review of the sinus films re-read under date of April 18, 1933.

For the Manager,

W. E. Kendall, M. D.,

Act. Chief, Out-Patient Service,
Hines, Illinois.

455. Special Ear, Nose & Throat Examination.

[Date 2/27/33

Nose Fair ventilation—profuse mucous and pus discharge both nares. Marked tenderness over frontal sinuses. Mild deviated septum.

X-ray Sinuses X-Ray shows: All sinuses to be clear and normal.

Throat.

Larynx Negative.

Diagnosis:

1. Chronic Catarrh Rhinitis.
2. Mild Deviated Septum.

Prognosis

1. Guarded.
2. Guarded.

A. Field, M. D.

(Examiner) A. Field, M. D. Attg. Bent. Spec.

456

Roentgenological Report: Dated: 2/27/33.

Sinuses: The roentgenological examination of the nasal accessory sinuses shows all sinuses to be clear and well aerated. There is no demonstrable X-ray evidence of pathology.

Summary: Sinuses—normal.

C. G. Lyons,
Medical Officer, V. A.
Chief, X-ray Service.

457

PLAINTIFF'S EXHIBIT NO. 19.

Plaintiff's Exhibit No. 19, in its entirety, is as follows:
Sioux Falls, South Dakota
December 9, 1931

C-4

Pence, Lawrence W.
C-1 437 493

Manager,
Veterans' Administration
Milwaukee, Wisconsin

Dear Sir:

Receipt is acknowledged of your communication of December 4, 1931, requesting copy of the report of physical examination, particularly an X-ray report (gastro-intestinal), taken in this case in July or August, 1934.

Review of our records indicate that a gastro-intestinal X-ray examination was made in this case April 6, 1925, in this office. Report of this examination is quoted herewith for your information: "G. I.—Fluoroscopic: Stomach negative. Duodenal Bulb-questionable. Suspected adhesions, hepatic flexor of colon. Plates: Colon negative. Cecum and appendix negative. Diagnosis: Suspected duodenal pathology.

X-ray films of this examination are being forwarded herewith for your records. Kindly acknowledge receipt of these films on the attached copy of this communication.

By direction,

A. R. Pearce,
Regional Medical Officer
Sioux Falls, South Dakota

Encl.

458

DEFENDANT'S EXHIBIT D.

Defendant's Exhibit D is the application of the insured for compensation and vocational training, the pertinent portions of which are as follows:

Application of Veteran Disabled in the World War for Compensation and Vocational Training

A. Personal History

1. Full name, Pence, Lawrence W.
2. Address (Resident Doctor). National Home, Wisconsin.

B. Military Experience and Related Information.

3. Under what name did you serve: Same.
4. Color White Date of birth Aug. 22, 1876. Place of birth Mason City, Iowa.
5. Make a cross (x) after branches of service you served in: * * * Army xx.
6. Date you last entered service Sept. 1, 1918. Place of entry State Center, Iowa.
7. Date of last discharge Jan. 9, 1919. Place of discharge Camp Dodge, Iowa.
8. Company and regiment or organization, vessel on which, or station in which, you last served Med. Officer, 56th M. G. Bn.
9. Rank or rating at time of discharge 1st Lieut.
10. Nature of discharge: Honorable xx.
11. Nature of disability claimed Sinusitis and Ethmoiditis Chr. and Chr. Atrophic Rhinitis and partial loss of smell. Myocarditis. Date disability began
12. Cause of disability Flu in service. Where received In service.
13. Did you receive treatment at any Army or Navy Hospital, or any other hospital while in the Service? No.

*Defendant's Exhibit D.***C. Industrial Survey**

15. Pre-war occupations. State your occupations and your average monthly earnings during the twenty-four months before entering the service:

Occupation Physician. Employer Self. Monthly earning undetermined. Did you work steadily? Yes.

459 17. If you are not working in the same place or at the same kind of employment as before entering the service, state why: Still practicing as Resident Surgeon at National Home, Wisconsin.

D. Medical Survey

18. Names and addresses of all physicians who have treated you since discharge: Name Self. Address. Disability. Date.

19. Have you been confined to bed or in hospital since discharge? Hospital None. Dates. Home Numerous times in winter. Dates.

20. Are you willing to accept medical or surgical treatment if furnished? Yes.

E. Educational History.

21. How far did you go in grade school? Yes. In high school? Yes.

22. What other schooling have you had, such as college, Army or Navy School, night school, correspondence school, etc.? (Answer fully.) State University of Iowa, B. S. and M. D.

I make the foregoing statements as a part of this application with full knowledge of the penalty provided for making a false statement as to a material fact in a claim for compensation, insurance, or vocational training.

Lawrence W. Pence,
(Signature of claimant)

Subscribed and sworn to before me this 27th day of August, 1928, by _____ claimant, to whom the statements herein were fully made known and explained.
(Illegible.)

Contact Representative.

We, the undersigned, severally solemnly swear that we have known the claimant whose name is subscribed above 2 years, and that we have read the statements made by him, and the facts stated are true to the best of our knowledge and belief.

Joseph H. Plant
(Signature of witness.)
National Home, Wisc.
(Address of witness)

L. G. Glickman
(Signature of witness.)
Nat. Home, Wisc.
(Address of witness)

Subscribed and sworn to before me this 27th day of August, 1928.

(Illegible)
Contact Representative.

460

DEFENDANT'S EXHIBIT E.

Defendant's exhibit E is an Application for Retirement executed by the insured on May 24, 1929. The pertinent portions of this exhibit are as follows:

Application for Retirement.

Under Certain Conditions, Of Officers And Former Officers Of The Army, Navy, Or Marine Corps Of The United States (Other Than Officers Of The Regular Army, Navy, Or Marine Corps) Who Incurred Physical Disability In Line Of Duty While In The Service Of The United States During The World War (April 6, 1917—July 2, 1921).

(Before filling in this Application please read the Emergency Officers' Retirement Act which is printed upon this form.)

To the Director of the United States Veterans Bureau:

I hereby apply for the benefits to which I may be entitled under the provisions of the Emergency Officers' Retirement Act, Public Number 506, of seventieth Congress, passed May 24, 1928, and the following statements are

made by me in support of my claim for retirement under the Act:

1. Name of officer Pence Lawrence W.
2. Address National Home, Wisconsin.
3. Date of birth August 22, 1876 at Macon City, Iowa.
Race White Amer.
4. Original entry into World War service in Army was as a 1st Lieut. on Sept. 1, 1918 at Camp Dodge, Iowa.
5. Discharged from active commissioned service on January 9, 1919 as 1st Lieut. Organization 56th M. G. Bn. 19th Div. at Camp Dodge, Iowa.
6. Character of discharge Honorable.
7. Service in organizations, at stations, or on vessels in the order named during World War, and prior thereto, including Army, Navy, Marine Corps, National Guard, Naval Militia, National Naval Volunteers, Naval Reserve Force, and Marine Corps Reserve, as follows: 56th M. G. Bn 19th Div. from Sept. 1, 1918 to Jan. 9, 1919.
8. State physical disability incurred during service (April 6, 1917—July 2, 1921) and in line of duty; when and where it was incurred: Disability Chr. Ethmoiditis, Sinusitis, Frontal, Myocarditis. Incurred at Camp Dodge, Iowa. Treated at self at Camp Dodge, Iowa from October, 1918.
9. Have you filed claim with the United States Veterans' Bureau for disability compensation? Yes.
- 461 10. Give the names and addresses of employers, and your monthly earnings for the 24 months preceding your entry into service in the World War: Employer Self (23 years) Address State Center, Iowa. Monthly earnings 800.00.
11. Describe clearly the duties performed in each occupation shown above, and the conditions under which you worked: Occupation with employer Practicing medicine. Dates, (23 years). Duties—Description of work General practice of medicine.

I certify that I am the person named in this application and that the statements made herein are true and correct to the best of my knowledge and belief.

(Signature) Lawrence W. Pence.

Date May 24, 1929.

Subscribed and sworn to before me this 24th day of May, 1929.

(Seal)

Harry R. Brown,
Notary Public.

462

DEFENDANT'S EXHIBIT NO. F.

Defendant's Exhibit F is an application of the insured for disability allowance, executed by him on July 14, 1930. The pertinent portions of this exhibit are as follows:

Application of Veteran For Disability Allowance Under Section 200, World War Veterans' Act, 1924, As Amended July 3, 1930.

Name Pence, Lawrence Waldo

Address National Home Wisconsin

I hereby apply for disability allowance under the provisions of Section 200 of the World War Veterans' Act, 1924, as amended July 3, 1930, and submit the following facts as evidence that I am eligible for that allowance.

1. Place of birth Mason City, Iowa

Date of birth Aug. 22, 1876

2. Description of applicant as of date of this application:
Sex Male Race White Weight 165 pounds Height 66½ inches

Color of hair Brown Color of eyes Brown Complexion Brunette

3. Give dates of enlistment and discharge for any period or periods of service during the World War, commencing prior to November 11, 1918.

Date Enlisted 9/1/18 Date Discharged 1/9/19 Serial No.

Place Enlisted State Center Ia Place Discharged Camp Dodge; Iowa

Nature of Discharge: Honorable x

Organization at Discharge 56 M.G. Bn.

Rank or Rating at time of Discharge 1st Lieutenant M. C.

4. (a) Have you ever applied for disability compensation? Yes

If so, when and where was application filed? Regional Office Milwaukee.

What is your Compensation Claim Number? C-1 437 493

(b) Have you ever been physically examined for the United States Veterans' Bureau? Yes.

If so, give date and place of last examination June 1929

Defendant's Exhibit F.

5. (a) Are you in receipt of retirement pay? No.
(b) Are you in receipt of reduced retirement pay? No
(c) Are you in receipt of retainer pay? No.
(d) Are you in receipt of a pension? No
(e) Are you in receipt of disability compensation? No
(f) Are you in receipt of insurance benefits? No
6. Nature of disease or injury on account of which disability allowance is claimed Sinusitis, frontal, Gas-troptosis, healed (?) duodenal ulcer, Myocarditis, Chr.
- 463 7. Give full name and complete address of nearest relative. Harriet Pence, (wife) National Home, Wisconsin.
8. Have you even been dishonorably discharged from any period of service in any branch of the military or naval service? No.
9. Are you employed? Yes
(a) What is your regular trade or vocation? Physician and Surgeon.
10. Did you file a Federal income tax return for the last calendar year? No.
(b) Were you exempted from payment of a Federal Income tax? No.

I hereby certify that answers to all questions are true and complete to the best of my knowledge and belief. (Note sections of law printed on reverse side of form)

Lawrence W. Pence,

(Signature of claimant)

Subscribed and sworn to before me this 14th day of July 1930, by Lawrence W. Pence, Claimant, to whom the statements herein were fully made known and explained.

Stella Kerschensteiner,

(Seal)

(Notary Public)

My commission expires Mar. 5, 1933.

464

DEFENDANT'S EXHIBIT NO. G.

Defendant's Exhibit G is the application for pension for disability resulting from service in the active military or Naval forces of the United States executed by the insured in this cause on December 8, 1933. The pertinent portions of this exhibit are as follows:

Veteran's Application For Pension For Disability Resulting From Service In the Active Military or Naval Forces of the United States Under Act of March 20, 1933.

I, Pence, Lawrence W.

Address

Hereby make application for pension under the act of March 20, 1933, as the result of disease or injury due to service.

1. (a) Place of birth Cerro Gordo County Iowa
(b) Date of birth Aug. 22, 1876
2. Description of applicant as of date of this application:
Sex Male Race White Weight 150 pounds. Height 65 1/2 inches.
Color of hair Brown Color of eyes Brown Complexion dark
3. Make a cross (X) after branches of service you served in: Army, X.
4. (a) Give following information about your active service and forward a certified copy of each certificate of discharge received:
Enlisted 9/1/18 Place Camp Dodge, Ia.
Discharged 1/9/19 Place Camp Dodge, Ia.
Rank and Organization 1st Lieutenant
Character of Discharge Honorable
(b) Have you ever been other than honorably discharged from any period of service in any branch of the military or naval service? No.
5. (a) Have you ever applied for any of the following benefits:

	Yes or No	Place of Application	Date	Claim Number
Disability compensation	Yes	Milwaukee, Wis.	10/10/28	1,437,493
Disability allowance	Yes	Milwaukee, Wis.	5/27/31	1,437,493
Retirement pay	Yes	Milwaukee, Wis.	6/31/29	1,437,493

- (b) Have you ever been physically examined for (1) The Veterans Administration? Yes (2) The former United States Veterans Bureau? Yes. (3) The former Pension Bureau? No.

6. Nature of disability, on account of which disability pension is claimed:

Sinusitis, frontal and antra, Myocarditis, chronic, Duodenal ulcer.

465 7. Give full name and complete address of nearest relative Harriette V. Pence (wife) Veterans Administration, Wis.

8. (a) If you received treatment while in the service, give the name, number or location of the hospital, first-aid station, dressing station, or infirmary, or the organization to which it was attached, the dates of treatment, and the nature of sickness, disease, or injury.

In quarters, Depot Brigade, Camp Dodge, Iowa, for sinusitis, acute, myocarditis, acute, gastric upset, believed at the time to be from "food poisoning", later diagnosed as duodenal ulcer.

(b) Names and addresses of all civilian physicians who have treated you for any sickness, disease, or injury since the beginning of your service:

Name	Present Address	Disability	Date
Dr. I. D. Kauffman, State Center, Iowa		Sinusitis, frontal	1919-20
Dr. R. F. French, Marshalltown, Iowa		Sinusitis, frontal	1920-21
Dr. Burke, Mason City, Iowa		Sinusitis, frontal	1922-23
Dr. Clarence DeWeiss, Lexington, Ky.		Sinusitis & myocarditis	1918
Dr. G. Glickman, Veterans Adm. Wis.		Sinusitis	1926

(c) Names and addresses of all persons other than physicians who know any facts about any sickness, disease, or injury which you have had in active service or since discharge from the service:

Name	Address	Disability	Dated
Raymond Linn	Des Moines, Ia. (Post office)	Sinusitis	1919-20
L. A. Richards	Milwaukee, Wis	Sinusitis & (heart trouble)	1925-30

9. What is your trade or vocation? Physician & surgeon.
(a) Are you employed? Yes If so, by whom? U. S. Government.

(b) I receive pension, retirement pay, Government insurance pay, in the amount of \$ no per month from the Veterans Administration Facility at and I have other income averaging \$ none per month from the following sources:

(c) Names and addresses of former employers for last 12 months:

Name and Address of Employer	Dates of Employment		Earnings Weekly-Monthly	Time Lost
	Beginning	Ending		
(1) Veterans Administration, Wis.	Jan. 1st 1933	Jan. 1, '34	\$316 (base pay)	15 days

(d) Are you now holding any office or position, appointive or elective, under the United States Government, or the municipal government of the District of Columbia or under any corporation, the majority of stock of which is owned by the United States Government? No.

(e) Are you being furnished hospitalization or institutional or domiciliary care by the United States or any political subdivision thereof? No.

466 10. Are you single, married, widower, or divorced? Married.

11. Times married two Date and place of last marriage? Galesburg, Ill. 1904.

12. Times present wife has been married one Maiden name Harriette Pierce

13. Do you live together? Yes.

14. Have you any legitimate or adopted child or children living under 16 years of age and unmarried, or any child of any age who is insane, idiotic, or otherwise permanently helpless? No.

15. (a) Is your mother now dependent on you for support? No.

(b) Is your father now dependent on you for support? No.

I Hereby Certify that answers to all questions are true and complete to the best of my knowledge and belief; that I have submitted all available information and evidence in

support of this application, and that the foregoing statements are made as a part thereof with full knowledge of the penalty provided for making a false statement as to a material fact in such application. (Note sections of law printed on front page.)

Lawrence W. Pence,
(Signature of Claimant)

Subscribed and Sworn to before me this 8th day of December, 1933, by Lawrence W. Pence, Claimant, to whom the statements herein were fully made known and explained.

(Seal) Stella Kerschensteiner,
Notary Public.

My commission expires Feb. 28, 1937.

(To be Completed by Veteran)

Date Dec. 8, 1933.

I, Pence, Lawrence Waldo, hereby make formal application for pension under the act of March 20, 1933, as the result of disease or injury due to service. I have previously made application for the benefits.

Lawrence Waldo Pence,
1st Lieutenant M. C. U. S. A.
Veterans Administration, Wis.

467 DEFENDANT'S EXHIBIT NO H AND
PLAINTIFF'S EXHIBIT NO. 12.

Defendant's Exhibit H and Plaintiff's Exhibit No. 12 is an application for conversion to U. S. Government Life Insurance executed by the insured in this cause on June 21, 1927. The pertinent portions of this exhibit are as follows:

Application for Conversion to U. S. Government Life Insurance.

In Accordance With The Provisions Of The World War Veterans' Act, 1924, and Bureau Regulations.

Serial Number K 711035

1. Name in full Lawrence W. Pence
2. Home Address: National Home, Wis.
Mailing Address: Same.

3. I was born at Mason City Iowa Aug. 22, 1876
Age nearest birthday—51
 4. Weight—168 Height—5' 6½" Color of Hair—Brown
 5. Race and Nationality—Wh.
 6. Rank and organization at time of discharge:
1st Lieut. U. S. Medical Corps. 56th M. G. Bn.
Dates of enlistments: Sept. 1, 1918.
Dates of discharges: Jan. 9, 1919.
 7. Amount of War Risk Term Insurance: \$10,000.
 8. Last month for which term premium was paid. June 1920.
 9. Monthly term premium paid. \$8.40.
 10. Certificate number. No. K. Number. T-3674111.
 11. I apply for \$10,000 U. S. Government Life Insurance on the Following Plan: Five Year Convertible Term **xx**.
 12. I will pay premiums as indicated below: Monthly—\$13.50.
 13. Only Beneficiaries of insurance hereby converted should be named on this Form.
- | Relationship to me | Name of Beneficiary | Amt. | Post office address |
|--------------------|---------------------|----------|--------------------------|
| Wife | Harriet Pence | \$10,000 | National Home, Wisconsin |
14. In addition to the converted insurance above applied for I wish to retain \$ none Yearly Renewable Term Insurance.
 15. I select the option indicated by cross mark x below:
No. 1 (xx) one sum.
 16. Have you ever made application for Government compensation or pension? No.

468 19. The applicant must remit with this application a sum not less than the amount of the first premium on the converted insurance applied for.

I inclose herewith remittance payable to the Treasurer of the United States by Check in the amount of \$21.90 to cover the first monthly premium on the converted insurance.

Signed at National Home, Wis. on the 21 day of June, 1927.

Lawrence W. Pence.

Witnessed by Charles W. Fisk, (?)
Address Milwaukee, Wis.

DEFENDANT'S EXHIBIT NO. J.

Defendant's Exhibit No. J is a statement by the insured in this cause, executed on September 7, 1928. The pertinent portions of this exhibit are as follows:

Claimant's Statement.

In the Compensation Claim No. C personally appeared Lawrence W. Pence, who, being duly sworn, states:

I am now suffering from a disability as follows: Sinusitis, frontal, Ethmoiditis, chronic, atrophic rhinitis, chronic, with loss of sense of smell, myocarditis, chronic.

That I incurred the disability, or disabilities, mentioned at or near Camp Dodge, Ia. on or about October 1918, under the following circumstances: Contracting influenza in line of duty. Stationed at Tent City, Camp Dodge, Ia., later transferred to base hospital in charge of influenza and pneumonia wards. Influenza mostly confined to nose and throat infection.

That during my military service I was not treated at the hospitals named: Remained in quarters and treated myself—other doctors overworked and not available. Was able to carry on but developed a severe frontal sinusitis and an acute myocarditis. Since discharge the sinusitis has become more severe with constant frontal headaches making it necessary for me to give up my practice and find employment where I could be inside. Cannot stand any exposure to cold.

That I was discharged from the service on Jan. 9th, 1919.

That immediately after and two months discharge the disability mentioned manifested itself and I noted the following symptoms: Constant frontal headaches with discharge from nares and dripping in throat, with shortness of breath and exhaustion on trying to do any work. Later there was a constant dryness in nose and still later began to notice loss of sense of smell. For nearly one year after returning from service a tendency to sleep was very noticeable—only by moving about could sleep be warded off. This symptom gradually became less noticeable. There seemed to be a constant "air hunger." This is still noticeable and is due to this myocarditis. Am working, but under a considerable hardship.

That a physician was called in to treat me on Jan. 1927,

when he pronounced my disability sinusitis, frontal, acute exacerbation and prescribed serum and local treatment tending to induce drainage. Treatment was carried out by myself. Was confined to bed for 8 days.

Lawrence W. Pence

(Signature of claimant.)

State of Wisconsin }
County of Milwaukee } ss.

Subscribed and Sworn to before me this 7 day of Sept.
A. D. 1928.

Charles W. Fisk,

Contact Representative.

470 DEFENDANT'S EXHIBIT NO. K.

This exhibit K introduced by the defendant is a medical and industrial history filed by the insured in this cause on October 10, 1928. The pertinent portions of this exhibit are:

7. What was your principal prewar occupation? Physician & Surgeon.

Annual Wages? \$7,000-\$8,000.

2. Give name and address of your principal employer in this occupation. Self.

4. Give the following information concerning each of the positions you have held during the period for which you are reporting:

Name of Employers: National Home, Wisconsin.

Give kind of work performed: Physician, Asst. Surgeon, Natl. Home, Wis.

From discharge to date. Annual Wages \$2750.

5. In the following spaces show the time lost from work during the period for which you are reporting, and state the disease or disability which caused the loss of time in each instance, and the medical treatment received:

Lost about two or three weeks per year on account of Sinus Trouble; while in private practice lost about one-half time.

6. Give the following information concerning your periods of hospitalization during the period for which you are reporting: None.
7. If at present employed, state your occupation. Asst. Surgeon, Natl. Home, Wis.
About how much do you earn per week in this occupation? \$2750 per annum.

Lawrence W. Pence
(Signature of Claimant)
National Home, Wis.
(Address)

471

DEFENDANT'S EXHIBIT NO. L.

Defendant's exhibit No. L is a supplementary statement of the insured which was received in the Veterans Administration at Milwaukee, Wisconsin, November 28, 1931. The pertinent portions follow:

C-1,437,493.

Subject: Supplementary information in connection with the application and affidavit of Lawrence W. Pence for rating and retirement under Officers' Retirement Act.

This supplementary report is given to clear some points which may appear conflicting or ambiguous or not in sufficient detail. The phrase "I treated myself" should read that I administered the treatment and medication furnished and directed by Major DeWeise who was Camp Physician, and by whose authority I was permitted to remain in barracks under his special care. By "no doctors available" was meant that there were no doctors assigned to treating men in barracks.

It was not unusual for medical officers and sometimes other officers to be allowed to stay in barracks under the care of their fellow officers, who now find themselves with no official record of illness in service. The incidents preceding and leading to the diagnosis of acute myocarditis are these: one night when Major DeWeise came in he found me sitting on the side of the bed. On being told that I was doing it because of difficulty in getting my breath and that I thought it was due to soft coal gas, he examined my chest with stethoscope and said: Mar, your heart is "shot". He got me some medicine which relieved the symptoms

and which continued to take as per his directions for several weeks. He told me I had acute myocarditis and that it would be necessary to take things rather quietly for some time. The acute severe gastric upset to which he alludes turned out to be a forerunner of duodenal ulcer which perforated in 1920 and again in 1925; because of constant distress and tarry stools I requested a GI. x-ray at the U. S. V. B. regional office at Sioux Falls, S. D. where I was then assigned to duty. The diagnosis at that time was duodenal ulcer active. The diagnosis of appendicitis 472 chronic was made from x-ray findings only. I am aware that resort to technicalities may defeat many worthy claims. But in my claim where it seems to me the diagnosis of acute streptococcus sore throat with involvement of frontal sinuses should be service connected, the rapid sequence of occurrence of myocardial involvement and the duodenitis which probably always precedes a duodenal ulcer, would, I believe, be taken in any medical history as a sequelae and directly due to swallowing of infected material from nose and throat. I never had a day of sickness in my life before this and I do not believe I have had an entirely well one since.

Respectfully,

Lawrence W. Pence.

473 DEFENDANT'S EXHIBIT NO. M.

Defendant's Exhibit M is a letter dated December 8, 1933, signed by the insured in this cause, addressed to the Administrator of the Veterans Administration. The letter follows:

December 8, 1933:

Re: Pence, Lawrence W.
C-1,437,493

Administrator,
Veterans Administration,
Arlington Building,
Washington, D. C.

Dear Sir:

In re decision rendered by Administrator's Board of Appeals dated January 6, 1932, on claims for compensation or Emergency Officers' Retirement pay.

This Bill of Exceptions is hereby submitted:

That the whole tempo of this survey and decision is that

of ridicule and an attempt to belittle the claim for benefit of the above captioned claimant.

That the findings and ratings allowed by the local rating board, based on the findings and diagnoses of the Examining Physicians, were not given proper credence.

That the diagnosis in question must be presumed to have been based on the findings noted at the time of examination and must be assumed to have been sufficient at that to justify the making of the diagnoses in question.

That "he was discharged from the army on January 9, 1919, with no defects." This is technically true, but the facts are he was discharged at his urgent request because of sickness at home (his wife and three children being sick with influenza at the time. He requested that no disabilities be recorded as it might delay his discharge. The Examining Board, fellow officers and friends concurred in this request.

That "the claimant was never hospitalized." He was not, altho it was recommended, for the reason that he was qualified to "treat himself" and well equipped. He is an eye, Ear, Nose & Throat Specialist with many years' experience. Why should he not "treat himself" rather than to burden some one else? He has been treating and operating on hundreds of cases of sinus disease, also examining and diagnosing these for rating purposes for several years. It seems strange that his statement that he "treated himself" should be made a matter of ridicule in an attempt to evade the points at issue.

The claimant admits he was employed at the time of his application, so was nearly every other officer to whom retirement pay was granted. Why bring that up? In 474 this connection claimant states that if granted "retirement pay" his resignation from the Veterans Administration will be immediately forthcoming.

That a misstatement as to the time of his employment is made in an apparent attempt to find discrepancies in the claimant's statements. The Claimant never stated that he was employed by the National Home service from the time of his discharge from the army, and no such statement occurs in his file.

That the X-ray pictures are not diagnostic in sinus disease and should not be used if in conflict with the clinical picture. The claimant has proven this on numerous occasions. Sinuses that have been reported "clear" by

the X-ray service have been operated because of severe subjective symptoms (frontal headache) and found to be completely filled by thick pyogenic membrane and homogenous pus. On the other hand many cases reported as "hazy" or "cloudy" have been found at operation to be normal.

That the affidavit of Major Clarence De Wiese at the time Camp Physician, an able Eye, Ear, Nose and Throat Specialist, and corroborated by Dr. C. H. Meyst, were given little credence, were called "not convincing" and therefore meaningless as were also the affidavits of Drs. Kaufman, French and Burke, all prominent physicians.

That the statement that a diagnosis of "sinusitis" had never been made by Veterans' Bureau doctors is at least misleading, as this diagnosis was made by Dr. Minsky at Veterans' Bureau hospital at Waukesha, Wisconsin, and accepted and rated accordingly by the local rating board, also by the Central Board at Chicago and was rated at 50% disability allowance and permanent partial 36% service connected for compensation purposes.

It should be well known that a degenerative type of myocarditis is the most treacherous form of heart disease known, as long as compensation keeps up there are very fine manifest symptoms and that when decompensation does occur it is usually complete and final.

This knowledge, it is believed, should be used in evaluating a diagnosis of degeneration myocarditis.

That the whole attitude of ridicule and belittlement adopted by the Board of Appeals in this case was contrary to the policy and instructions to be followed in the conduct and adjudication of veterans' claims.

That the decision was rendered on legal technicalities and not on the physical facts presented.

That the examination made at Hines hospital on February 27, 1933, has never been reviewed. The findings at that time are definite for sinusitis and myocarditis degenerative type.

L. W. Pence
Lawrence W. Pence, M. D.
C-1437439.

475 DEFENDANT'S EXHIBIT NO. Q.

Defendant's Exhibit No. Q is a Physician's Affidavit, executed September 7, 1928, by Dr. L. Grant Glickman in regard to the insured in this cause. The pertinent portions of this affidavit follow:

In the Compensation Claim No. C Lawrence W. Pence personally appeared Dr. L. Grant Glickman of Nat'l Home, Wisc. who, being duly sworn, states:

I am a practicing physician in the State of Michigan. That after his discharge from the military service on Jan. 9, 1919, I first examined the claimant on Jan. 16, 1927. His complaint at that time was: Frontal sinusitis & Ethmoiditis, chronic.

Upon physical examination I found the following symptoms present: Headache, severe; bloody purulent discharge from nose.

I diagnosed the injury or disease as Chronic ethmoditis & frontal sinusitis with an auto ex(a)cerbation.

The prognosis was fair but incurable.

I do believe the claimant's disability is attributable to his military service, for the following reasons: Statement of claimant that above trouble followed influenza in service. Never troubled before that time with above disabilities.

Claimant continued under my care until Jan. 25, 1927, during which time I treated him as follows: Arygrol instillations & packs. Serum therapy.

L. Grant Glickman, M. D.
(Signature of affiant.)

State of Wisconsin, }
County of Milwaukee. } ss.

Subscribed and sworn to before me, this 7th day of Sept. A. D. 1928.

Charles W. Fisk,
Contact Representative.

478 April 26, 1940—Motion of defendant for judgment non obstante verdicto, in accordance with its motion for directed verdict, or in alternative, for a new trial, filed as follows:

IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—147) • •

Filed
Apr. 26,
1940.

MOTION FOR JUDGMENT NON OBSTANTE VERDICTO OR IN THE ALTERNATIVE MOTION FOR NEW TRIAL.

Now comes the defendant, the United States of America, by its attorney, of record, Berthold J. Husting, United States Attorney, E. J. Koelzer, Assistant United States Attorney, and William M. Lytle, Attorney, Department of Justice, and moves this Honorable Court that judgment notwithstanding the verdict of the jury be entered for the defendant in the above styled cause, in accordance with its motion for directed verdict at the close of all of the evidence (Rule 50 b of Rules of Civil Procedure), for the reasons hereinafter presented.

The defendant further moves this Honorable Court that in the event its motion for judgment notwithstanding the verdict of the jury, in accordance with its motion for a directed verdict, is not allowed, that a new trial be granted for the applicable reasons hereinafter presented.

1. That the defendant submitted to the Court and jury, by a preponderance of substantial evidence, that the policy herein sued upon was procured through fraud on the part of the insured in that he deliberately deceived and misled the defendant, the insurer, by making material representations in his application for the policy sued upon which were untrue and known to be untrue by the insured when made.

479 2. That the record is replete with evidence, including the insured's statements and admissions over his signature, and in some instances, in his own handwriting, that he had been ill with diseases since the lapse of his original contract of insurance in 1920; had been prevented since 1920, by reason of ill health, from attending his usual occupation and had consulted and been treated by a physician since the lapse of his insurance in 1920, namely, in January 1927; also that he had been treated, while in the military service in 1918 for a disease of the heart, namely, myocarditis, by a Dr. DeWeese and had suffered from myocarditis from and after the date of his military service until his death.

3. That the record shows by the insured's own statements and admissions that he had consulted five different physicians for sinusitis, frontal or myocarditis from 1918 up to and including the month of January 1927.

4. That the record shows that the insured did consult and was treated by a physician (Dr. Glickman), from January 16, 1927 to January 25, 1927, for frontal sinusitis and chronic ethmoiditis, that his symptoms were severe headache with bloody, purulent discharge from the nose, causing acute exacerbations, and that he was treated with argyrol instillations and packs and serum therapy.

5. That the insured was treated by another physician (Dr. French), after his discharge from service in 1919 for acute infections of the sinuses with a purulent discharge and which Dr. French testified came under affections of the throat, and that the symptoms at the time of such consultation and treatment were frontal headache with purulent discharge with blood.

6. That the insured discussed his complaints of chronic sinus trouble and headache in 1922 or 1923 with another physician (Dr. Burke), telling him that he had to give up his private practice because it was too hard for him to continue in view of his headaches and sinus trouble.

7. That the interests of the defendant were prejudiced in the minds of the jury by the appearance, in a daily 480 newspaper, the Milwaukee Journal, on April 16, 1940, of an article purporting to contain apparently verbatim statements of the Court made during the course of the trial, out of the hearing of the jury but which were read in the newspaper by four of the jurors as shown upon inquiry by the Court after the verdict.

8. That the purported remarks of the Court referred to in paragraph seven were prejudicial to the interests of the defendant, inasmuch as they stated that it was "manifestly unfair," and that "it didn't seem that the government acted in very good faith" in using as evidence statements made by the insured to secure compensation on account of sinus infection, when the government claimed he did not have it (sinus trouble). The said purported remarks of the Court were read by four jurors and may be reasonably assumed to have also come indirectly to the attention of other jurors, and were, therefore, particularly prejudicial in that the matter on which the Court's opinion and remarks were based, namely, "when the government claimed he did not have it"

were not in evidence as Exhibits #5 and #11 had been refused by the Court when offered in evidence by plaintiff and were not at any time presented to the jury.

9. That the Court erred in instructing the jury that treatment for sinus conditions did not come under Question 11 of the insured's Application for Reinstatement, (plaintiff's Exhibit 3), despite the fact that he instructed the jury that in view of the fact that there was testimony that sinus conditions did come under "throat" under question No. 11 and some testimony that it did not come under "throat," they were at liberty to judge for themselves whether or not it did or did not. In so instructing the jury the Court unconsciously and unintentionally assumed the role of witness and added his opinion to that of the medical witnesses.

It is respectfully submitted that in view of defendant's presentation of clear and convincing proof, founded upon substantial unrefuted evidence of fraud in the procurement of the policy herein sued upon, that the verdict of the jury herein be set aside and judgment be entered for the defendant in accordance with its motion for directed verdict (Rule 50b of Rules for Civil Procedure).

It is further submitted that in the event that the defendant's motion for judgment notwithstanding the verdict is denied, that the Court set aside the verdict of the jury and grant a new trial in this cause.

(Sgd.) Berthold J. Husting,

Berthold J. Husting,

United States Attorney.

By E. J. Koelzer,

E. J. Koelzer,

Ass't United States Attorney.

Wm. M. Lytle,

William M. Lytle,

Attorney, Dept. of Justice.

Endorsed: "Filed Apr. 26, 1940, B. H. Westfahl, Clerk."

476 Nov. 12, 1940—verdict of jury, filed as follows:

Filed
Apr. 17,
1940.

UNITED STATES DISTRICT COURT.

* * (Caption—147) * *

VERDICT.

We, the Jury duly sworn and empaneled to try the issues in the above entitled cause, find the issues herein in favor of the plaintiff.

/s/ George R. Fuller,
Foreman.

U. S. Dist. Court, East. Dist. Wis.

Endorsed: "Filed Apr. 17, 1940, B. H. Westfahl, Clerk."

477 April 22, 1940—plaintiff's motion for judgment on verdict, filed as follows:

Filed
Apr. 22,
1940.

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—147) * *

MOTION.

Now comes the plaintiff, Harriet V. Pence, by William B. Collins, her attorney, and moves the Court for judgment on the verdict of the jury, returned in the above entitled action on April 17th, 1940.

/s/ William B. Collins,
Attorney for Plaintiff.

P. O. Address:

William B. Collins,
1029 West Wells Street,
Milwaukee,
Milwaukee County,
Wisconsin.

NOTICE OF MOTION.

To: United States Attorney, B. J. Husting and Assistant United States Attorney, J. Koelzer and William M. Lytel, Attorneys for Defendant:

Please Take Notice that the undersigned will bring the above motion on for hearing before this Court at the United States District Court Room in the Federal Building,

517 East Wisconsin Avenue in the City of Milwaukee, Wisconsin, on the 29th day of April, 1940, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ William B. Collins,
Attorney for Plaintiff.

P. O. Address:

William B. Collins,
1029 West Wells Street,
Milwaukee, Wisconsin.

Endorsed: "Filed Apr. 22, 1940, B. H. Westfahl, Clerk."

482 May 7, 1940—opinion of court on motion for directed verdict, filed as follows:

IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—147) * *

Filed
May 7,
1940.

OPINION ON MOTIONS AFTER VERDICT.

This is an action upon a policy of war risk insurance. Doctor Lawrence W. Pence applied for a policy of government life insurance while he was in the Army during the World War. On February 1, 1920, the policy lapsed for non-payment of premiums. On June 21, 1927, Doctor Pence executed an application for reinstatement of the full amount of his original war risk term insurance policy in the sum of \$10,000, and on the same date executed an application for conversion to a \$10,000 U. S. Government life five-year convertible term insurance policy. The policy was reinstated as of July 1, 1927, and premiums were thereafter paid by Doctor Pence; therefore, if the policy was validly existing, it would have been in full force and effect on September 21, 1934, the date of his death.

The government has defended upon the ground that 483 the insured made untrue, material representations in his application for reinstatement and that he knew that said representations were untrue when they were made.

The action was tried to a jury, which returned a verdict in favor of the plaintiff.

The questions in the application for reinsurance, and answers thereto, relied upon by the government are as follows:

Question 5: Are you now in as good health as you were on the due date of the premium in default? Answer: Yes. The government does not seriously contend that the proof in this case would show that Dr. Pence's answer to Question 5 was false.

Question 7: Have you been ill, or contracted any disease, or suffered any injury, or been prevented by reason of ill health from attending your usual occupation, or consulted a physician in regard to your health since lapse of this insurance? Answer: No. If so, give dates and full particulars, including the name and address of physicians.

Question 11 asks whether the applicant has ever been treated for any disease of—and then follows numerous portions of the body including "throat or lungs," "heart or blood vessels," and "bones." The attorney for the government attempted a very strained interpretation, by claiming that sinusitis is a disease of either the "throat or lungs" or "bones." As it appears from the testimony that 484 sinusitis is an infection or inflammation of the mucus membrane of the sinus cavities, by no reasonable interpretation could Doctor Pence be held to have given an untrue statement; because he may have been afflicted with sinusitis. In fact, in answers to questions asked by the Court, several of the government doctors admitted that sinusitis is not a disease of the "throat or lungs" or of the "bones."

Commencing a year or two after Doctor Pence's policy of insurance had been reinstated, he made various applications for disability compensation, retirement pay, and pension. It is common knowledge that many veterans during those years made applications for such relief from the government. In making such applications Doctor Pence made statements as to his physical condition which the court received in evidence in this case. They were proper evidence from which the jury might have come to the conclusion that Doctor Pence answered falsely Questions 7 and 11 in his application for reinstatement.

The case of *Bailey v. U. S.*, 92 F. (2d) 456, decided by the Circuit Court of Appeals for the 5th Circuit, is very close in its facts to the case at bar. In that case the policy was reinstated as of July 1, 1927. The government claimed that the application contained false statements and misrepresentations because Bailey's application stated he was

in as good health at that time as he was on the date the 485 policy lapsed; that he was not permanently and totally disabled; that he had not been ill or contracted any disease, or suffered any injury, or been prevented by reason of ill health from attending his usual occupation, or consulted a physician in regard to his health since the lapse of his insurance. Bailey, like Doctor Pence, had attempted to obtain disability allowance and had made statements as to his physical condition upon which the government relied. The court said (p. 458):

"The statement of appellant in his application for disability compensation filed in June, 1929, that he had been disabled since 1919 is indeed evidence from which the jury might find that he knowingly made false statements in connection with his reinstatement in 1925 * * *, but it is not conclusive proof that he did."

The court held in the Bailey case that it was a question for the jury.

In this case, the government relied quite strongly upon a newspaper article that appeared in The Milwaukee Journal, purporting to give the substance of remarks made by the Court not in the presence of the jury.

To sustain its contention in this case, the government leaned heavily upon statements of Doctor Pence in his applications for disability allowance, etc. to the effect that he was afflicted with sinusitis. However, the government had denied these applications, and had found that Doctor Pence was *not* afflicted with sinusitis. But this Court could not permit the evidence of such government findings 486 to be received into evidence. The Court did criticize such attitude on the part of the government, but these remarks were not in the presence of the jury. A short newspaper article followed. A strong instruction was given to the jury, as follows:

"My attention has been called to an article in The Milwaukee Journal of last evening. I do not know whether any of you read the Journal, or read the article. It purported to narrate some comments that I made in a discussion with counsel not in the presence of the jury. You are not permitted to reach your verdict in this case with reference to what some newspaper may claim occurred not in the presence of the jury. You must base your decision entirely upon the testimony given here in court. If any of you may

have read this article, you are instructed that you must entirely disregard same; that anything contained therein must have no effect whatsoever upon your verdict.

"You have taken your oath to decide this case upon the evidence and upon the law as given to you by the court, and I am sure that you will conscientiously fulfill your duties."

After the jury returned their verdict and had been polled, they were asked whether any of the members had read the article in question. Four jurors had read the article, but all assured the court that when they reached their verdict they had in mind the Court's instruction, and that the article had no weight or influence in causing them to agree to the verdict. The remarks complained of had not been made in the presence of the jury, and I am firmly of the opinion that the article did not influence the jurors in any way.

While the jury might well have found for the defendant considering the evidence of this case, still it was a 487 jury question. The plaintiff should have judgment upon the verdict.

In his brief, counsel for the plaintiff sets forth his claim that interest should be allowed from the date of the death of Doctor Pence. It would appear that the policy did not, by its terms, become payable until due proof of death. The Court does not recall that any testimony was received fixing that date. If the Court is in error and testimony was received whereby this date can be ascertained from the evidence, the Court would like to be advised by counsel.

Dated at Milwaukee, Wisconsin, this 7th day of May, A. D. 1940.

F. Ryan Duffy,
Judge.

Endorsed: Filed May 7, 1940. B. H. Westfahl, Clerk.

488 May 8, 1940—Supplemental opinion of Court on motion for directed verdict, filed as follows:

IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—147) • •

Filed
May 8,
1940.

SUPPLEMENTAL OPINION.

In the opinion rendered by this court under date of May 7, 1940, the question of interest was left open. The former opinion will therefore be considered amended, by striking out the last paragraph thereof, appearing on p. 6, commencing with the words "in his brief." There will be considered as added to such opinion the following:

"Counsel for plaintiff asked that interest be allowed upon the sum of \$10,000 from the date of the death of Doctor Pence. Under the authority of *U. S. v. Worley*, 281 U. S. 339, interest may not be allowed, and request of counsel for plaintiff will be denied."

A reply brief from counsel for the defendant has been received subsequent to the writing of the opinion herein. This brief has been carefully considered. The plaintiff may have judgment upon the verdict. The motion of 489 the defendant for a directed verdict and for judgment notwithstanding the verdict will be denied.

Dated at Milwaukee, Wisconsin, this 8th day of May, A. D. 1940.

F. Ryan Duffy,
Judge.

Endorsed: Filed May 8, 1940. B. H. Westfahl, Clerk.

490 May 28, 1940—ORDER FOR JUDGMENT, filed as follows:

IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—147) • •

Entered
May 28,
1940.

This action being at issue, and having been brought on for trial before the court and a jury, and the issues having been tried on the 15th, 16th and 17th days of April, 1940, the plaintiff, Harriet V. Pence, being represented by her attorney, William B. Collins and the defendant, United States of America, being represented by William L. Lytle, attorney for the Department of Justice, B. J. Husting,

United States Attorney and E. J. Koelzer, assistant United States attorney; and after being impaneled and sworn, the said jury heard the evidence of witnesses for both sides and the arguments of counsel and the instructions of the court and then retired to consider their verdict and having thereafter, on the 17th day of April, 1940, returned their verdict finding the issues herein in favor of the plaintiff which said verdict is filed herein, and

The plaintiff herein having moved in writing for judgment on the verdict of the jury and the defendant herein having moved for a directed verdict at the close of the evidence and the court having reserved its ruling thereon and the defendant having also moved for judgment notwithstanding the verdict and, in the alternative, for a new

trial; and said motions having come on for hearing on 491. the 29th day of April, 1940, before the court, and argument having been made thereon, and briefs having been submitted for both sides, and the plaintiff having requested that interest be allowed on the verdict from the maturity of the insurance policy at the death of the assured, and

It appearing that the court carefully weighed the arguments of counsel for plaintiff and defendant and carefully considered all the briefs submitted by counsel and now being fully informed;

Now, therefore, on motion of William B. Collins, and Aaron Scheinfeld, attorneys for plaintiff, Harriet V. Pence.

It Is Ordered that the motion of the defendant's counsel for directed verdict at the close of the evidence of which a ruling was reserved, be and the same is hereby denied; that the motion of defendant's counsel for judgment notwithstanding the verdict, be and the same is hereby denied; that the motion of defendant's counsel in the alternative for a new trial on the issues in this case, be and the same is hereby denied; that the motion of plaintiff's counsel for interest on the principal sum due under the insurance contract be and the same is hereby denied, and

It Is Further Ordered that the motion of the plaintiff's counsel for judgment on the verdict be and the same is hereby allowed and the clerk of this court is authorized and directed to enter judgment on the verdict for the plaintiff, and

It Is Further Ordered that plaintiff's attorneys William B. Collins, and Aaron Scheinfeld be and they are hereby

granted a lien on the amount due the plaintiff, Harriet V. Pence, from the United States of America, for their services in said case in the sum of One Thousand (\$1,000.00) dollars, the same being 10% (ten per cent) of the 492 amount recovered, and that said lien for this amount may be discharged by the defendant, United States of America, by the payment of One Thousand (\$1,000.00) dollars directly to said plaintiff's attorneys and that the payment herein directed to be made by the United States of America to said plaintiff's attorneys constitutes a satisfaction of said judgment for the amount so paid.

Let judgment be entered accordingly.

Dated: May 28th, 1940.

By the Court

/s/ F. Ryan Duffy,

United States District Judge.

P. O. Address:

William B. Collins

1029 West Wells Street

Milwaukee

Milwaukee county

Wisconsin

Endorsed: Filed May 28, 1940, B. H. Westfahl, Clerk.

493 And afterwards, to-wit: on the 123rd day of said Term, to-wit: on the 28th day of May, A. D. 1940, the following proceedings were had, to-wit: Entered
May 28,
1940.

IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—147) • •

At a general term of the District Court of the United States for the Eastern District of Wisconsin, begun and held at the Federal Court Room, 517 East Wisconsin Avenue, in the city and county of Milwaukee and on the 15th, 16th and 17th days of April, 1940;

Present Honorable F. Ryan Duffy, of the United States District Court, presiding:

This action having been tried before the court and a jury on the 15th, 16th and 17th days of April, 1940, William B. Collins and Aaron Scheinfeld, attorneys, representing

the plaintiff, and William L. Lytle, attorney for the Department of Justice, B. J. Husting, United States Attorney and E. J. Koelzer, Assistant United States Attorney, representing the defendant, United States of America, and

The jury having returned its verdict for the plaintiff on April 17th, 1940, and the court by order having denied the various motions of the defendant herein, and having granted plaintiff's motion for judgment on the verdict of the jury;

494 Now, on motion of William B. Collins and Aaron Scheinfeld, attorneys for the plaintiff, Harriet V. Pence,

It Is Adjudged that said plaintiff, Harriet V. Pence, do have and recover from the defendant, United States of America, the sum of Ten Thousand (\$10,000) dollars in accordance with the verdict of the jury and the terms and provisions of the contract of insurance on the life of Lawrence W. Pence, deceased, and

It Is Further Adjudged that plaintiff's attorneys, William B. Collins and Aaron Scheinfeld, be and they are hereby granted a lien on the amount due the plaintiff, Harriet V. Pence, from the United States of America, for their services in said case in the sum of One Thousand (\$1,000) dollars, said lien being 10% (ten per cent) of the amount recovered; that said lien on the amount of Ten Thousand (\$10,000) dollars, due under this judgment from the United States of America, may be discharged by said defendant, United States of America by the payment of One Thousand (\$1,000.00) dollars directly to said plaintiff's attorneys and the payment herein directed to be made by the United States of America to said plaintiff's attorneys shall constitute a satisfaction of said judgment for the amount so paid.

Dated: May 28th, 1940.

By the Court:

/sgd/ B. H. Westfahl,

Clerk of United States District Court.

Endorsed: Filed May 28, 1940, B. H. Westfahl, Clerk.

495 August 26, 1940—NOTICE OF APPEAL, filed as follows: Filed
Aug. 26,
1940.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Eastern District of Wisconsin.

Harriet V. Pence,	} Civil Action No. 147.
<i>Plaintiff,</i>	
vs.	
United States of America,	
<i>Defendant.</i>	

Notice is hereby given that the above-named defendant, United States of America, by B. J. Husting, United States Attorney for the Eastern District of Wisconsin, and E. J. Koelzer, Assistant United States Attorney for the Eastern District of Wisconsin, hereby appeals to the United States Circuit Court of Appeals for the Seventh Circuit from the final judgment entered in the above-entitled action in favor of the plaintiff and against the defendant on the 28th day of May, 1940, and from the whole thereof.

Dated this 26th day of August, 1940.

B. J. Husting,

United States Attorney.

E. J. Koelzer,

Assistant United States Attorney.

Room 358 Federal Building,

Milwaukee, Wisconsin.

Endorsed: Filed Aug. 26, 1940, B. H. Westfahl,
Clerk.

496 Sept. 30, 1940—ORDER EXTENDING TIME FOR
FILING RECORD ON APPEAL, filed as follows:

IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—147)

The above-named defendant, the United States of America, having on the 26th day of August, 1940, filed its notice of appeal dated August 26th, 1940, in the above-entitled

case, and having within forty (40) days from the date of the said notice of appeal made application for an extension of time for filing the record on said report and docketing said action.

It is Hereby Ordered, under Rule 73(g) of the Rules of Civil Procedure for the District Courts of the United States, that the time within which the said defendant, the United States of America, shall file the record on appeal in the above-entitled case and docket the action is hereby extended to the 24th day of November, 1940.

Dated at Milwaukee, Wisconsin, this 30th day of September, 1940.

F. Ryan Duffy,

District Judge.

Endorsed: Filed Sept. 30, 1940, B. H. Westfahl,
Clerk.

Filed
Nov. 12,
1940. 497 Nov. 12, 1940—DESIGNATION OF CONTENTS
OF RECORD ON APPEAL filed as follows:

IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—147) • •

To the Clerk of the United States District Court for the Eastern District of Wisconsin:

You will please prepare and certify the record in the above entitled cause to the United States Circuit Court of Appeals for the Seventh Circuit at Chicago and include therein the following:

1. Complaint filed August 5, 1939.
2. Motion of defendant to strike portions of complaint filed September 22, 1939.
3. Order striking certain portions of complaint filed October 2, 1939.
4. Answer of defendant filed October 11, 1939.
5. Plaintiff's demand for jury trial filed December 26, 1939.
6. The entire transcript of the oral testimony and proceedings at the trial, pages 1 to 287, both inclusive, of the transcript filed in the District Court on November 8, 1940.
7. An abridged statement of the contents of Plaintiff's Exhibits Nos. 1, 2, 3, 4, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, and

19, and Defendant's Exhibits D, E, F, G, H, I, J, K, L, M, and Q, appearing in the complete transcript of the record filed in the District Court on Nov. 8, 1940.

498 8. Verdict of jury filed April 17, 1940.

9. Plaintiff's motion for judgment on the verdict filed April 22, 1940.

10. Motion of defendant for judgment non obstante verdicto, in accordance with its motion for directed verdict, or in the alternative, for a new trial, filed April 26, 1940.

11. Opinion of the Court on motion for directed verdict filed May 7, 1940.

12. Supplemental opinion of the Court on motion for directed verdict filed May 8, 1940.

13. Order for judgment in favor of plaintiff filed May 28, 1940.

14. Judgment in favor of plaintiff filed May 28, 1940.

15. Notice of appeal from judgment filed August 26, 1940.

16. Order extending the time for filing record on appeal to November 24, 1940, filed September 30, 1940.

17. This designation of contents of record on appeal filed November 12, 1940.

B. J. Husting,

B. J. Husting,

U. S. Attorney,

E. J. Koelzer,

E. J. Koelzer,

Ass't U. S. Attorney.

Wm. M. Lytle,

Wm. M. Lytle,

Attorney, Dept. of Justice.

Endorsed: Filed Nov. 12, 1940. B. H. Westfahl, Clerk.

Admission of Service.

Service of the within Designation of Contents of Record on Appeal is hereby admitted this 12th day of November, 1940.

Wm. B. Collins and Schemfield
Collins,

Durant & Winter,

By Aaron Schoenfeld and

William B. Collins,

Attorneys for Plaintiff.

499

CERTIFICATE OF CLERK.

United States of America, } ss.
Eastern District of Wisconsin.

I, B. H. Westfahl, Clerk of the District Court of the United States of America for the Eastern District of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, which are copies, with their originals now on file and remaining of record in my office, and that they are true copies of the pleadings, judgment and other papers, together with original transcript of proceedings of trial and original abridged statement of the contents of exhibits, in the case of Harriet V. Pence vs. United States of America, Civil Action No. 147.

In Testimony Whereof, I have hereunto set my hand, and duly affixed the seal of said Court at the City of Milwaukee, in said district, this 22nd day of November, in the year of our Lord, one thousand nine hundred and forty, and of the Independence of the United States, the 165th.

B. H. Westfahl,
Clerk.

(Seal)

UNITED STATES CIRCUIT COURT OF APPEALS,

Filed
Dec. 30,
1940.

For the Seventh Circuit.

Harriet V. Pence,
Plaintiff-Appellee,
vs.
United States of America,
Defendant-Appellant. } Cause No. 7516.

It Is Hereby Stipulated by and between the above named parties, through their respective attorneys, that the plaintiff's and defendant's exhibits, offered or introduced in evidence at the trial of the above-entitled action in the District Court for the Eastern District of Wisconsin, are not to be included or printed in the printed transcript of record herein, and that in lieu thereof the abridgment of the contents of said exhibits which abridgment is part of and included in the certified Record on Appeal herein is to be printed. This stipulation is being entered into for the purpose of complying with Rule 75 (e) of the Rules of Civil Procedure.

William B. Collins,
Attorney for Plaintiff-Appellee.
E. J. Koelzer,
Asst. U. S. Atty.,
Attorney for Defendant-Appellant.

Approved:
Sparks, C. J.
December 30, 1940.

(Endorsed) United States Circuit Court of Appeals.
(Caption) Stipulation for Abbreviation of
Printed Transcript of Record. U. S. C. C. A. 7. Filed
Dec. 30, 1940. Kenneth J. Carrick, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES

Filed
Feb. 28,
1941.

For the Eastern District of Wisconsin.

Harriett V. Pence.

Plaintiff,

vs.

United States of America.

Defendant.

**Civil Action
No. 147.**

STATEMENT OF POINTS URGED UPON APPEAL.

I.

(a) The court erred as a matter of law in failing to grant and sustain defendant-appellant's motion for a directed verdict at the end of all of the evidence.

(b) The Court erred as a matter of law in overruling and denying defendant-appellant's motion for judgment notwithstanding the verdict, in accordance with its motion for a directed verdict, because the evidence established that the policy of insurance sued upon was obtained by fraud.

II.

(a) The Court erred in denying defendant-appellant's motion for a mistrial.

(b) The Court erred in overruling and denying defendant-appellant's motion for a new trial, because incurable prejudice to defendant-appellant resulted from the knowledge, by some of the jurors, of a newspaper report of certain proceedings in the trial of the case had out of the presence of the jury.

B. J. Husting,

B. J. Husting;

U. S. Attorney.

E. J. Koelzer,

E. J. Koelzer,

Ass't U. S. Attorney.

Wm. M. Lytle,

Wm. M. Lytle.

Atty. Dept. of Justice.

NOTICE.

To Mrs. Harriett V. Pence, Plaintiff-Appellee, and
William B. Collins, Counsel for Plaintiff-Appellee,
1029 West Wells Street, Milwaukee, Wisconsin:

You and each of you will please take notice that the
within "Statement of Points Urged Upon Appeal," a copy
of which is herewith served upon you by mailing, with af-
fidavit of mailing attached, will be filed with the Clerk of
the United States District Court for the Eastern District
of Wisconsin at Milwaukee, on to-wit: February 21, 1941.

Attorneys for Appellant:

B. J. Husting,

B. J. Husting,

U. S. Attorney.

E. J. Koelzer,

E. J. Koelzer,

Ass't U. S. Attorney.

Wm. M. Lytle,

Wm. M. Lytle,

Atty. Dept. of Justice.

Dated: February 20, 1941.

Endorsed: "Filed Feb. 28, 1941, B. H. Westfahl, Clerk."

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Harriet V. Pence,
Plaintiff-Appellee,

vs.

United States of America,
Defendant-Appellant.

C. C. A. 7516.

AFFIDAVIT OF SERVICE BY MAILING.

William M. Lytle, Attorney of the Bureau of War Risk
Litigation, Department of Justice, Chicago, Illinois, being
first duly sworn, deposes and says that on the 20th day of
February, 1941, he caused to be served upon counsel for the
plaintiff-appellee, William B. Collins, 1029 West Wells
Street, Milwaukee, Wisconsin, a copy of Answer of de-
fendant-appellant to motion of plaintiff-appellee to dismiss

appeal or affirm judgment of District Court, in the above entitled cause, with copies of designation of additional contents of the record, and statement of points relied on, to be filed instant in the United States District Court at Milwaukee, Wisconsin, attached.

The affiant further deposes and says that the aforesaid copies of Answer of defendant-appellant, designation of additional contents of the record, and statement of points relied on, were served upon Mr. William B. Collins, the opposing counsel, by personally depositing a copy of each in the United States Post Office at Chicago, enclosed in an envelope plainly addressed to the attorney for the plaintiff-appellee, Mr. William B. Collins, at his office or place of business at 1029 West Wells Street, Milwaukee, Wisconsin, with postage thereon fully prepaid.

Wm. M. Lytle,
William M. Lytle,
Attorney, Dept. of Justice.

Subscribed and sworn to before me this 20th day of February, 1941.

(Seal) Anna L. Minalian,
Notary Public.

My commission expires on Feb. 5, 1944.

Endorsed: "Filed Feb. 28, 1941, B. H. Westfahl, Clerk."

IN THE DISTRICT COURT OF THE UNITED STATES

Filed
Feb. 28,
1941.

For the Eastern District of Wisconsin.

Harriet V. Pence,
Plaintiff,

vs.

United States of America,
Defendant.

Civil Action
No. 147.

DESIGNATION OF ADDITIONAL CONTENTS OF
RECORD ON APPEAL.

To the Clerk of the United States District Court for the Eastern District of Wisconsin:

You will please prepare and certify to the United States Circuit Court of Appeals for the Seventh Circuit at Chi-

cago, as an addition to the record in the above entitled cause, the following:

1. A copy of this designation of additional contents of the record on appeal, filed this 28th day of February, 1941.
2. A copy of statement of points urged upon appeal, filed on the 28th day of February, 1941.
3. A copy of affidavit of service by mailing filed on the 28th day of February, 1941.

B. J. Husting,
 B. J. Husting,
United States Attorney.
 E. J. Koelzer,
 E. J. Koelzer,
Assistant U. S. Attorney.
 Wm. M. Lytle,
 William M. Lytle,
Attorney, Dept. of Justice.

NOTICE.

To: Harriet V. Rence, Plaintiff-Appellee and
 William B. Collins, counsel for Plaintiff-Appellee;
 1029 West Wells Street, Milwaukee, Wisconsin:

You and each of you will please take notice that the within designation of additional contents of the record in the above entitled cause, a copy of which is herewith served upon you by mailing with affidavit of service attached, will be filed with the Clerk of the United States District Court for the Eastern District of Wisconsin on, to-wit, February 21, 1941.

Dated February 20, 1941.

Attorneys for the defendant-appellant:

B. J. Husting,
 B. J. Husting,
United States Attorney.
 E. J. Koelzer,
 E. J. Koelzer,
Assistant U. S. Attorney.
 Wm. M. Lytle,
 William M. Lytle,
Attorney, Dept. of Justice.

Endorsed: "Filed Feb. 28, 1941, B. H. Westfahl, Clerk."

CERTIFICATE OF CLERK.

Eastern District of Wisconsin }
United States of America } ss.

I, B. H. Westfahl, Clerk of the District Court of the United States of America for the Eastern District of Wisconsin, do hereby Certify that I have compared the writings annexed to this Certificate, and that they are true copies of the originals now on file and remaining of record in my office of:

1. Appellant's Statement of Points urged upon appeal, filed Feb. 28, 1941.

2. Designation of Additional Contents of Record on Appeal, filed Feb. 28, 1941.

3. Affidavit of Service of Answer of Defendant Appellant to Motion of Plaintiff Appellee to Dismiss Appeal, etc., filed Feb. 28, 1941.

Certified pursuant to designation of additional contents of record on appeal in the case of Harriett V. Pence, Plaintiff Appellee vs. United States of America, Defendant Appellant, Civil Action No. 147, C. C. A. 7516.

In Testimony Whereof, I have hereunto set my hand and duly affixed the seal of said Court, at the city of Milwaukee, in said district, this 1st day of March in the year of Our Lord, One Thousand Nine Hundred and Forty-one and of the Independence of the United States the One Hundred Sixty-fifth.

(Seal)

B. H. Westfahl,
Clerk.

[fol. 238]

[Caption omitted]

[fol. 239] IN UNITED STATES CIRCUIT COURT OF APPEALS,
SEVENTH CIRCUIT

7516

HARRIETT V. PENCE, Plaintiff-appellee,

VS.

THE UNITED STATES OF AMERICA, Defendant-appellant

Appeal from the District Court of the United States for the
Eastern District of Wisconsin

ORDER AS TO PRINTED RECORD—December 30, 1940

Pursuant to stipulation of counsel, it is ordered that the plaintiff's and defendant's exhibits, offered or introduced in evidence at the trial in this cause, be not included in the printed record to be filed herein, and that in lieu thereof the abridgment of the contents of said exhibits, included in the certified record on appeal herein, be printed.

[fol. 240] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MOTION TO DISMISS OR AFFIRM—Filed February 15, 1941

Now comes the appellee, the plaintiff herein, and moves the Court to dismiss the appeal of the defendant herein, or to affirm the judgment of the District Court of the United States for the Eastern District of Wisconsin with interest and penalty as provided in Rule 23 (1) and (2) for the following reasons.

1. To dismiss the appeal or affirm the judgment on the ground that appellant failed to comply with Rule 9 of this Court no statement of points having been filed with "the clerk of the district court, for inclusion in the record on appeal," said statement of points to, "set out separately and particularly each error asserted and intended to be urged."

2. To dismiss this appeal or affirm the judgment of the District Court herein on the ground that it raises no substantial question for consideration by the court and is therefore lacking in merit.

3. To dismiss the appeal or affirm the judgment on the ground that it lacks merit and is frivolous and as having [fol. 241] been taken for the purpose of delay.

4. To impose such penalty in addition to the judgment and interest upon the appellant herein, for having taken an appeal for the purpose of delay as this court shall deem just and equitable under the facts here present.

Harriett V. Pence, Plaintiff and Appellee; William B. Collins, Attorney for Plaintiff.

To B. J. Husting, United States Attorney; E. J. Koelzer, Assistant U. S. Attorney; William M. Lytle, Attorney, Dept. of Justice.

Please Take Notice, that the within motion to dismiss the appeal or affirm the judgment herein, and to impose upon the appellant a penalty for delay caused by this appeal, a copy whereof is herewith served upon you, together with petition to dismiss and brief on said motion, will be submitted to the United States Circuit Court of Appeals for the Seventh Circuit, in Chicago, Illinois, on the 15th day of February, 1941.

Dated February 14th, 1941.

William B. Collins, Attorney for Appellee.

[fol. 242] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

[Title omitted]

AFFIDAVIT OF HARRIETT V. PENCE

Harriet Pence, being first duly sworn, on oath deposes and says that she is the plaintiff in the above entitled case and makes this affidavit for the purpose of moving the court for an order dismissing this appeal for the reason that she verily believes that the appeal is taken for the purpose of delay; that she is informed and believes that no substantial question exists for consideration by this court.

Affiant further states that she has reached this conclusion in part at least, from the past history of this case; that her husband Lawrence Waldo Pence, died on September 21, 1934, and that he had a \$10,000 five year convertible term insurance policy in full force and effect on the day of his death; that on October 2, 1934, she filed claim with the United States Veterans' Administration for that amount [fol. 243] as the widow and beneficiary of said policy; that on June 5, 1935, the United States denied her claim.

Affiant further states that she instituted action against the United States for the amount of said policy on July 5, 1935, and the defendant answered her complaint and her amended complaint and in both answers admitted that a "disagreement" within the contemplation of the act existed; that for almost three years she and her attorney tried to force the case on for trial before the Hon. F. A. Geiger and that in the latter part of March, 1938, the Court set the first case for trial on April 8, 1938; that thereafter and on or about March 30, 1938, the United States denied that there was a disagreement and moved for dismissal of the action on the ground that she had appealed from the disallowance of her insurance claim; that said motion was heard in April, 1938, and that case was dismissed by the District Court of the United States for the Eastern District of Wisconsin on January 11, 1939, although affiant contended that the appeal to the Administrator of Veterans' Affairs was from a disallowance of her claim for pension and not from the disallowance of her insurance claim; that no appeal was taken from the order of January 11, 1939 dismissing the first case because plaintiff thought it would result in greater delay in securing a trial on the merits.

Affiant further states that it took from January 11, 1939, until July 10, 1939, to get the Administrator of Veterans' Affairs to enter a formal disallowance of her insurance claim in order to permit her to commence the pending action with a "disagreement," which could not be questioned. [fols. 244-245] That the judgment in the case at bar was filed on May 28, 1940, the notice of appeal was served and filed herein on August 26, 1940, and on September 30, 1940, the defendant secured an order under the rules to extend the time for filing the record of appeal to November 24, 1940.

That affiant makes this affidavit for the purpose of moving this Court to dismiss the appeal as having been taken merely for the purpose of delay and to impose upon the de-

defendant the penalty provided in such case; that affiant has no means of her own and if the judgment is affirmed has lost the interest on the money due her from September 21, 1934, to the date of filing the judgment herein, May 28, 1940.

Harriett V. Pence, Plaintiff and Appellee.

Subscribed and sworn to before me this 3rd day of February, 1941. Lyman G. Wheeler, Notary Public, Milwaukee Co., Wis. My Commission Expires March 5, 1944. (Seal.)

[fol. 246] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

[Title omitted]

ANSWER OF DEFENDANT-APPELLANT TO PLAINTIFF-APPELLEE'S
MOTION TO DISMISS THIS APPEAL OR AFFIRM THE JUDGMENT
OF THE DISTRICT COURT—Filed February 21, 1941

Now comes the United States of America, the defendant-appellant in the above entitled cause, by its undersigned attorneys, and in answer to plaintiff-appellee's motion to dismiss this appeal or affirm the judgment of the District Court, respectfully shows the Court:

1. That defendant-appellant's failure to file with the Clerk of the District Court, for inclusion in the record on appeal, a "Statement of Points" on which he intends to rely, we believe is not an adequate or sufficient reason for dismissal of this appeal by the Court. While Rule #9 of this Court states that no appeal shall be considered unless such a statement of points shall have been so filed, the Rule does not provide the penalty of dismissal for failure to comply therewith. We believe and assume that Rule 9 was meant to be construed reasonably and to be consistent with Rule 75(d) of the Rules of Civil Procedure for the District Courts of the United States and was not intended by this Court to prescribe a ground for invalidating an appeal when Rule 75(d) has been strictly complied with. It [fol. 247] seems inconceivable to us that plaintiff-appellee and her counsel should ask for a dismissal of this appeal when a complete statement of the points on which the defendant-appellant relies in this lawsuit appears in its

"Motion For Judgment Non-Obstante Verdicto and in the Alternative, For a New Trial" in the District Court (R. 215-217). The contents of this motion have been fully known to plaintiff-appellee's counsel since it was filed and service of a copy thereof acknowledged by him on April 26, 1940.

This appeal was taken on August 26, 1940. Thereafter all of the Rules of Civil Procedure for the District Courts of the United States and the Rules of this Court, with the exception of Rule 9, were fully complied with, including the designation in the District Court and the filing in this Court of the complete record of all the proceedings and evidence of the case in the District Court.

While we do not ask this Court to condone our failure to formally comply with Rule 9, we do request that consideration of the fact be given that we were mindful that plaintiff-appellee had been fully apprised of the points upon which we relied in this lawsuit by our motion for judgment non-obstante ver-dicto, etc., and that we did comply with Rule 75(d) when we filed a complete record of the case. Furthermore, we intended and expected to submit a complete statement of points relied on in defendant-appellant's brief which will be filed herein on or before March 6, 1941, the time allowed as extended by this Court.

2. That plaintiff-appellee's motion to dismiss this appeal or affirm the judgment of the District Court on the ground that it raises no substantial question for the consideration of the Court and consequently lacking in merit, is, we think, to say the least, premature and untimely. Until the defendant-appellant's and plaintiff-appellee's briefs discussing the merits of the very substantial questions presented by this appeal have been filed and oral argument [fol. 248] heard, it is, we think, obviously impossible for this Court to determine the questions presented in advance thereof for either the purpose of affirming or dismissing the appeal. The defendant-appellant's brief is being prepared and will be filed herein within the time allowed by this Court on or before March 6, 1941.

3. We think the motion to dismiss the appeal or affirm the judgment in the District Court appearing in this paragraph of plaintiff-appellee's motion comes within the same category as that contained in the previous paragraph 2 and our answer thereto applies hereto as well.

4. For answer to plaintiff-appellee's motion to impose a penalty upon the defendant-appellant for having taken this appeal for the purpose of delay, we are not conscious of having any purpose to delay this action or of having performed any act or taken any step with such a view in mind. We, therefore, of course, deny any intention of delay in reaching a final determination of this lawsuit by any person or attorney on behalf of the defendant-appellant. We further state that such delays as have occurred since this lawsuit was filed have not been the result of any fault on behalf of the Government or any of its representatives.

WHEREFORE, having answered, the defendant-appellant prays this Honorable Court that plaintiff-appellee's motion to dismiss this appeal or affirm the judgment in the District Court of the United States be overruled and denied.

The defendant-appellant further prays this Honorable Court that it be permitted and granted leave to file herein a certified additional designation of the record with a "Statement of Points" relied on, of which the attached is a copy, as a part of the record in this Court.

B. J. Husting, U. S. Attorney. E. J. Koelzer, Ass't
U. S. Attorney. Wm. M. Lytle, Attorney, Dept.
of Justice.

[fol. 249]

Notice

To Harriett V. Pence, Plaintiff-Appellee and William B. Collins, Counsel for Plaintiff-Appellee, 1029 West Wells Street, Milwaukee, Wisconsin:

You and each of you will please take notice that the within Answer of Defendant-Appellant to Plaintiff-Appellee's Motion to Dismiss this Appeal or Affirm the Judgment of the District Court, a copy of which is herewith served upon you by mailing, with affidavit of mailing attached, will be submitted to the United States Circuit Court of Appeals for the Seventh Circuit at Chicago on to-wit: February 21, 1941.

Dated February 20, 1941.

Attorneys for Appellant: B. J. Husting, U. S. Attorney; E. J. Koelzer, Ass't U. S. Attorney; Wm. M. Lytle, Attorney, Dept. of Justice.

[fols. 250-252] Statement of Points urged upon appeal omitted. Printed side page 233 ante.

[fol. 253] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING MOTION TO DISMISS OR AFFIRM, ETC.—February 26, 1941

It is ordered that the motion of appellee to dismiss this appeal or to affirm the judgment of the District Court be, and it is hereby, denied, without prejudice to the right to renew said motion at the hearing of this cause on the merits; and that leave be, and it is hereby, granted to appellant to file a certified additional designation of the record with a "Statement of Points" relied on.

RECITAL AS TO FILING OF STATEMENT OF POINTS

And afterwards, to-wit: On the third day of March, 1941, there was filed in the office of the Clerk of this Court, a certified copy of statement of points urged upon appeal, which said statement of points is not copied here as the same appears on page 233 of the printed record certified herewith under a separate certificate.

[fols. 254-255] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER GRANTING LEAVE TO FILE TYPEWRITTEN BRIEFS, ETC.—March 25, 1941

On motion of counsel for appellee, it is ordered that leave be, and it is hereby, granted to file an original and four copies of typewritten appellee's briefs in lieu of printed briefs required by the rules.

It is further ordered that the motion to renew appellee's motion to dismiss the appeal, etc., be, and it is hereby, denied until the hearing of this case on the merits.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—April 18,
1941

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. Keith L. Seegmiller, counsel for appellant; and by Mr. William B. Collins, counsel for appellees, and the Court takes this matter under advisement.

[fol. 256] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT, OCTOBER TERM, 1940, APRIL SES-
SION, 1941

No. 7516

HARRIETT V. PENCE, *Plaintiff-Appellee*,

vs.

THE UNITED STATES OF AMERICA, *Defendant-Appellant*
Appeal from the District Court of the United States for the
Eastern District of Wisconsin

Before SPARKS and KERNER, *Circuit Judges*, and LINDLEY,
District Judge

OPINION—Filed July 2, 1941

SPARKS, *Circuit Judge*:

The Government appeals from a judgment in favor of the beneficiary of a policy of war-risk insurance, contending that reinstatement of the policy after lapse for non-payment of premiums was obtained by fraud, hence denying liability on it. The case was tried to a jury which rendered a general verdict in favor of appellee.

Appellee has filed her motion to dismiss the appeal on the grounds that no statement of points was filed with the clerk of the District Court for inclusion with the record, pursuant to Rule 9 of the court; that it raises no substan-

tial question for consideration by this court, is frivolous and was taken only for purposes of delay. She also asks that a penalty be imposed upon appellant for having taken the appeal for purposes of delay.

With respect to the absence of the statement of points from the original record, although it was included later by leave of this court, we have recently held that failure of an appellant to comply with Rule 75(d) pertaining to [fol. 257] the inclusion of a statement of points is not jurisdictional and does not necessitate dismissal of the appeal. See *Adams, et al. v. N. Y., Chicago and St. Louis R. R. Co.*, decided by this court May 20, and June 24, 1941. Inasmuch as we are of the opinion that the appeal presents a serious question, we cannot agree with appellee that it should be dismissed for frivolity. Under all the facts here presented we think the motion to dismiss should be, and it is denied.

The principal questions presented by the appeal are whether the court erred in failing to grant appellant's motion for a directed verdict or for judgment notwithstanding the verdict because the evidence established that the policy sued upon was reinstated by fraud; and whether the court erred in denying appellant's motion for a mistrial on the ground of prejudice arising out of a newspaper report by which some of the jurors learned of certain proceedings had out of their presence.

The insured, Dr. Pence, an eye, ear, nose and throat specialist, entered the military service as a medical officer in August, 1918. He returned to private practice after his honorable discharge in January, 1919. In December, 1924, he applied for and passed a civil service examination for appointment to the medical service, and in March, 1925, he returned to Government service, being employed thereafter in various Government hospitals.

While in the military service, Pence obtained a policy of war risk insurance in the amount of \$10,000 which he permitted to lapse for non-payment of premiums in February, 1920. In June, 1927, he applied for reinstatement of the policy, answering the following questions as indicated:

5. "Are you now in as good health as you were at the due date of the premium default? Yes."

7. "Have you been ill, or contracted any disease, or suffered any injury, or been prevented by reason of ill

health from attending your usual occupation, or consulted a physician in regard to your health, since lapse of this insurance? No."

In connection with his medical examination he answered the following question in the negative as to each and every part:

11. "Have you ever been treated for any disease of brain or nerves No, throat or lungs No; heart or blood vessels [fol. 258] No, stomach, liver, intestines No, kidney or bladder No, genito urinary organs No, skin No, glands No, ear or eye No, bones No."

The medical examiner recommended acceptance of the risk as a first-class one, and the policy was, accordingly, reinstated as of July 1, 1927. The insured died on September 21, 1934. He had been at home for two days, September 17 and 18, with a cold, but had not been attended by a physician. He worked all day before his death, and was found dead in bed the morning following. His death certificate, signed by the physician in charge of the hospital where he was employed, but who had not attended him, gave as the cause, "coronary thrombosis, sudden death, myocarditis chronic, chronic sinusitis, nasal accessory sinusitis, with acute exacerbation." There was no autopsy performed.

In August, 1928, the insured filed application for compensation, claiming that he was disabled because of "Sinusitis and Ethmoiditis Chr. and Chr. Atrophic Rhinitis and partial loss of smell. Myocarditis" caused by "Flu in service." In May, 1929, he filed application for retirement, again reciting his service-incurred disabilities from chronic ethmoiditis, sinusitis frontal, and myocarditis. In December, 1933, he filed application for a pension for disability resulting from his military service, caused by sinusitis and myocarditis, and listing the names of five physicians who had treated him from 1918 to 1926. In support of the August, 1928 application, the insured furnished the affidavit of two physicians who stated that they had known him for over two years, and that the facts therein contained were true to the best of their knowledge and belief. He also furnished his own sworn statement that he had suffered from sinusitis and chronic myocarditis since his service, and that his sinusitis had become so

severe after his discharge that he had had to give up his practice and find employment where he could be inside, and that he could not stand any exposure to cold.

Supplementing his application for retirement, the insured reported that in 1918, during service, the Camp Physician examined him and told him that he had acute myocarditis for which he prescribed rest and medication which the insured continued to take under his directions for several weeks. He also stated that he had an acute gastric upset which subsequently developed into a duodenal [fol. 259] ulcer which perforated in 1920 and again in 1925; and that in 1925 he requested a gastro-intestinal X-ray examination which disclosed an active duodenal ulcer. There was a report of this examination in a letter dated December 9, 1931, from the regional medical officer of the area where Pence was employed at the time of the examination, to the Milwaukee Veterans' Administration, stating that their records showed that they had examined Pence in April, 1925: "G. I.—Fluoroscopic: Stomach negative. Duodenal Bulb—questionable. Suspected adhesions, hepatic flexor of colon. Plates: Colon negative. Cecum and appendix negative. Diagnosis: Suspected duodenal pathology."

December 8, 1933, the insured wrote a very indignant letter to the Veterans' Administration protesting their disposition of his claims for compensation or retirement pay, and their failure to give proper consideration to the affidavits of the five physicians filed in support thereof. He reiterated his defects and disabilities, stating, "It should be well known that a degenerative type of myocarditis is the most treacherous form of heart disease known, as long as compensation keeps up there are very fine (sic) manifest symptoms and that when decompensation does occur it is usually complete and final. This knowledge, it is believed, should be used in evaluating a diagnosis of degeneration myocarditis."

In addition to these reports, the Government also introduced the testimony of a physician who had known the insured while he was in private practice in Iowa, and who stated that the insured had confided to him in 1922 or 1923, that he planned to get out of private practice because he found the country practice too hard for him.

Appellee's response to the array of evidence regarding the condition of her husband's health at the time of re-

instatement as indicated by his own statements is that they were false and no attention need be paid to them. She says in her brief, "Standing alone these statements of Pence would prove fraud in his reinstatement on July 1, 1927, but we submit the medical reports of the defendant's own doctors prove Pence's statements false." The reports referred to were of examinations made in connection with his applications for employment in the United States Veterans' Bureau, for reinstatement of his policy, for compensation and for retirement. The first, dated November, 1924, reported no valvular heart disease, and a second, in [fol. 260] March, 1925, reported negatively as to everything inquired about, including nose, throat and heart. There was no inquiry about the gastric organs.

In October, 1928, two physicians reported, one that "X-ray shows all sinuses clear," and the other, "Heart: Not enlarged . . . myocardial tone poor Diagnosis: Lessened Myocardial tone and reserve. Myocardial Degeneration beginning." In June, 1929, the latter physician reporter, "Myocardial tone *fairly* good," and that he noted "*no definite* cardio-vascular disease" (our italics), and another diagnosed his condition as Gastropno-sis. In November, 1930, the medical examiner reported that his heart was slightly enlarged but no murmurs; according to X-ray findings, there was no pathology involving the stomach, but a possible duodenal ulcer, and the nasal sinuses were normal. There was also a diagnosis of chronic appendicitis. In 1931, the report was of moderate, permanent frontal sinusitis and deviated nasal septum and chronic, moderate duodenal ulcer, appendicitis and myocarditis.

Appellee ~~also~~ introduced the testimony of four lay witnesses, including herself and two sons, to prove the excellent state of the health of the insured and his freedom from anything but common colds up to the time of his death. They testified that he was a very active man, taking care of a garden and mowing his own lawn, engaging in numerous strenuous sports, going on frequent hunting and fishing trips, in all of which he kept up with the others and did not seem to be tired. They also testified that while he was not a heavy eater, he did not require a special diet, but ate what was prepared for all.

A very close question is presented as to whether the record shows any question for the jury, or whether mis-

representation was proved as a matter of law, entitling the Government to a directed verdict in its favor. 'Certainly it appears to us that the Government is entitled to rely upon statements furnished by Pence for a different purpose, to prove the falsity of the information furnished for the purpose of reinstating the policy.

Our study of the record reveals three actual discrepancies between the answers in the application for reinstatement and the data furnished in support of the subsequent applications. We find no evidence of falsity in the affirmative answer to the fifth question, whether he was in as good health as at the date of default. His negative answer to that portion of the seventh question which inquired whether he had consulted a physician in regard to his health since the lapse of the insurance, appears to be false in view of his own statement of the gastro-intestinal examination in 1925, corroborated by the report of the examination from the office where it was given; and also his affidavits regarding treatments for sinusitis. While the latter might appear immaterial in view of the fact that there was no reference to a disease of the nose or sinuses in the eleventh question, the answer was not, in fact, accurate. His negative answer to the part of the eleventh question bearing on whether he had *ever* been treated for any disease of the heart appears to be false in view of his report of treatment during his military service by the camp physician who prescribed medication and rest for what he diagnosed as acute myocarditis.

In an opinion on motions after verdicts, the court stated with reference to the various applications for disability compensation, retirement pay, and pension, "It is common knowledge that many veterans during those years made applications for such relief from the government. In making such applications Doctor Pence made statements as to his physical condition which the court received in evidence in this case. They were proper evidence from which the jury might have come to the conclusion that Doctor Pence answered falsely Questions 7 and 11 in his application for reinstatement." We do not agree with this interpretation of the evidence. It appears to us that the facts pointed out above prove beyond question, not that the insured *might have* answered falsely, but that he *did* answer falsely in the particulars noted. That the Government by its examinations in response to the applications proved that

the claims therein were not well grounded does not prove the facts contained therein false, and it was those facts which the Government was entitled to know, and about which it inquired before reinstating the policy. It must be remembered that to be entitled to the relief claimed, Pence had to be *disabled* by the diseases and ailments with which he said he was afflicted; to whatever extent required by the regulations, while to be disentitled to the reinstatement of the policy, he had merely to *have* the diseases and ailments. While the myocarditis from which his own state-[fol. 262] ment showed he had suffered and received treatment as early as 1918, did not, according to the evidence, prevent him from leading a perfectly normal, active life, nevertheless, it was one of the causes of his death seven years after reinstatement of the policy. We think his failure to disclose the fact constituted a material misrepresentation, the effect of which was to avoid the policy. See 29 Am. Jur. on Insurance §§ 570 and 572; 4 Couch Cyclopaedia of Insurance Law § 885h at p. 2987.

The District Court, in determining that a jury question was presented, cited the case of *Bailey v. United States*, 92 F. 2d 456, and appellant relies upon that, and upon *Jones v. United States*, 112 F. 2d 282. In both of these cases, judgments entered in favor of the Government on verdicts directed by the court were reversed on appeal. In the *Bailey* case, the same physician examined the insured for reinstatement of his policy, and later submitted affidavits claiming his total disability prior to the date of reinstatement. The Court of Appeals said, "That some of the statements made in connection with appellant's claims under his war risk policy, and for compensation, cannot be reconciled with others made by him and his physician, is quite plain. It was for the jury, however, and not for the court, to say which statements were true and which were false, which were innocently and which were fraudulently made." . . . the policy provision that it should be incontestable after six months from the date of issue or reinstatement, except for fraud, means just that, and that unwitting, nonwillful misstatements of fact could not constitute fraud within the provision." In the *Jones* case, the insured explained away irreconcilable statements contained in his applications for reinstatement and for disability compensation by saying that he had never agreed with his physician when he told him he had tubercu-

losis and should move to a different climate, and according to his explanation, he apparently did not think that the informal conversations with him amounted to consultations with a physician. The Court of Appeals considered this a satisfactory explanation of his failure to mention the consultation with the physician and his negative answers to two questions relating to diseases resulting from service or contracted thereafter.

While it is true that the question of whether or not the insured has misrepresented or falsified concerning medical [fol. 263] attendance, consultation with or treatment by physicians and the like is ordinarily a question for the jury, as stated in 4 Couch Cyclopaedia of Insurance Law §889j, "concealment or misrepresentation may be of facts in a legal sense material to the risk, or fraudulent, in either of which cases the issue should not be submitted to the jury." See also Annotation, 131 A. L. R. 617 at 626. We think there was such concealment and misrepresentation here, and that the falsity of the answers was proved little over a year later by the statements of the insured when he sought to obtain a different type of relief and had no difficulty in recalling his consultations and treatment which he at that time deemed serious. We cannot agree that these inconsistent statements were either immaterial or nonwillful, or that they presented any question for the jury to determine which were true and which false. We are convinced that the Government was entitled to have the verdict directed in its favor. This view of the case renders it unnecessary for us to pass upon the other question presented by the appeal, relating to the effect of a prejudicial newspaper article which was brought to the attention of some of the jurors. However, we have studied the record as to this issue, and we are convinced that whatever prejudice might have resulted from the article was cured by the court's careful instruction on the issue.

Judgment reversed, and cause remanded for further proceedings in harmony with this opinion.

DISSENTING OPINION

KERNER, *Circuit Judge*, dissenting:

My reading of this record has convinced me that the case presented a jury question; consequently, the judgment of the District Court should be affirmed.

[fol. 264] IN UNITED STATES CIRCUIT COURT OF APPEALS

7516

HARRIETT V. PENCE, Plaintiff-Appellee,

vs.

THE UNITED STATES OF AMERICA, Defendant-Appellant

Appeal from the District Court of the United States for the
Eastern District of Wisconsin

JUDGMENT—July 2, 1941

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings in harmony with the opinion of this Court filed in this cause.

RECITAL AS TO FILING OF PETITION FOR REHEARING

And afterwards, to-wit: On the eighteenth day of July, 1941, there was filed in the office of the Clerk of this Court, a petition for a rehearing, which said petition for a rehearing is not copied here.

[fol. 265] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—August 4, 1941

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, denied.

[fol. 266] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

[Title omitted]

MOTION FOR ORDER STAYING MANDATE—Filed August 9,
1941

The Plaintiff-Appellee moves the Court as follows:

For an order to stay the mandate in the above entitled cause for a period of thirty days to permit Plaintiff to apply for certiorari to the Supreme Court of the United States.

August 7, 1941.

William B. Collins, Attorney for Plaintiff-Appellee.

Address: 1029 W. Wells Street, Milwaukee, Wisconsin.

Notice of Motion

To B. J. Husting, United States Attorney, E. J. Koelzer, Assistant United States Attorney and to William M. [fol. 267] Lytle, Department of Justice, Attorneys for the Defendant:

Please take notice that the undersigned will on August 8, 1941 file the above motion with the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit at his office at 1212 Lake Shore Drive, in the City of Chicago, State of Illinois.

William B. Collins, Attorney for Plaintiff-Appellee.

Address: 1029 W. Wells Street, Milwaukee, Wisconsin.

[fol. 268] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER STAYING MANDATE—August 18, 1941

On motion of counsel for appellee, it is ordered that the mandate of this court in this cause be, and it is hereby, stayed pursuant to Rule 25 of the rules of this Court.

[fol. 269] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 270] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 10, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 271] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA
PAUPERIS—November 10, 1941

On Consideration of the motion for leave to proceed further herein *in forma pauperis*,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

(8615)

FILE COPY

Office - Supreme Court, U. S.

FILED

SEP 29 1941

CHARLES ELMORE GROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 665

HARRIET V. PENCE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA:

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND BRIEF IN
SUPPORT THEREOF**

WILLIAM B. COLLINS,
Counsel for Petitioner.

INDEX.

SUBJECT INDEX.

	Page
Petition for writ of certiorari	1
Summary statement of matter involved	1
Jurisdiction of Supreme Court to review	3
Reasons relied on for allowance of writ	6
Prayer of writ	8
Brief in support of petition for writ of certiorari	9
Opinions of court below	9
Jurisdiction	9
Statement of the case	10
Specification of errors	10
Argument	10
Summary of argument	10
Point A—The issue presented by the conflicting evidence in the record in this case was a question of fact for the jury	11
Point B—The Circuit Court of Appeals by its decision has usurped the dis- cretion vested by Rule 50b and the common law in the District Court and has violated the Seventh Amendment to the Constitution of the United States by depriving petitioner of a jury trial	21
Point C—Petitioner's motion to dismiss defendant's appeal should have been granted by the Circuit Court because that court never acquired jurisdic- tion	24

TABLE OF CASES CITED.

<i>Aetna Life Ins. Co. v. Ward</i> , 140 U. S. 76, 91	24
<i>Bailey v. United States</i> (5th Cir.), 92 F. (2d) 456, 458	7, 20

<i>Baltimore & C. Line v. Redman</i> , 295 U. S. 654, 659	8, 21
<i>Berry v. United States</i> , 311 U. S. —, 61 Sup. Ct. 637, 638	8, 24
<i>Clawans v. Whitford</i> , 55 F. (2d) 1037, 1038, 287 U. S. 605	26
<i>Drew v. United States</i> (6th Cir.), 104 F. (2d) 936, 942	7, 20
<i>Gunning v. Cooley</i> , 281 U. S. 90, 94	8, 23
<i>Jones v. United States</i> (8th Cir.) 112 F. (2d) 282, 286	7, 20
<i>Kelley v. Mut. Life Ins. Co.</i> , 113 F. (2d) 633, 638	26
<i>Lumbra v. United States</i> , 290 U. S. 551, 560, 290 U. S. 550, 553	15, 22
<i>Richmond & Danville R. R. v. Powers</i> , 149 U. S. 43, 45	8, 23
<i>Rio Grande Irrigation Co. v. Gildersleeve</i> , 174 U. S. 603, 608	26
<i>Strochmann v. Mutual Life Ins. Co.</i> , 300 U. S. 435, 440	8, 22
<i>Thompson v. Hatch</i> , 3 Pick. 512	26
<i>Weil v. Neary</i> , 278 U. S. 160, 168, 169	26

TABLE OF STATUTES CITED.

Seventh Amendment to Constitution of United States	3, 10, 11, 22, 23
Judicial Code:	
Section 240 (28 U. S. C. A. #347a)	3
Section 122 (28 U. S. C. A., Section 219)	25

—RULES OF COURT CITED.

Rule 9, Subdivision 1, Rules of the Circuit Court of Appeals for Seventh Circuit	5
Rule 75 (d) Federal Rules of Civil Procedure	26
Rule 50 (b) Federal Rules of Civil Procedure	4, 6, 10, 21

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 665

HARRIET V. PENCE,
Petitioner and Appellee below,

vs.

THE UNITED STATES OF AMERICA,
Respondent and Appellant below.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

*To the Honorable Harlan Fiske Stone, Chief Justice of the
United States, and the Associate Justices of the Supreme
Court of the United States:*

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

This is an action at law brought in the District Court
of the United States for the Eastern District of Wisconsin
by the Petitioner herein against the United States of Amer-

ica, respondent herein, to recover the amount of a World War Veteran's Convertible Term Insurance Policy (R. 14). The policy was reinstated as of July 1st, 1927, and all premiums paid thereon down to the time of insured's death on September 21, 1934 (R. 14). The defense was that the insured secured such reinstatement by fraud (R. 10). The trial was by jury and a verdict and judgment was rendered in favor of the plaintiff and against the defendant, the United States of America (R. 225, 226).

A motion of the defendant for directed verdict was denied by the trial court (R. 224, 157). A motion for judgment by defendant notwithstanding the verdict and in the alternative for a new trial was filed by defendant on April 26th, 1940, and within 10 days after the verdict was returned (R. 215, 217). These motions were denied (R. 224). An appeal was taken from the judgment by defendant to the Circuit Court of Appeals for the Seventh Circuit (R. 227). Before the hearing in the Circuit Court, petitioner, on February 15th, 1941, moved to dismiss defendant's appeal or affirm the judgment of the District Court with penalty for delay on the grounds hereinafter set forth (R. 240). This motion was denied (R. 245, 246-247).

The principal questions involved on said appeal were:

(a) Whether the issue of alleged fraud in said reinstatement on the record in the case was a question of fact for the jury or a question of law for the Court; whether defendant's motion for directed verdict should have been granted (R. 215, 217).

(b) Whether the Circuit Court should grant the motion of the petitioner to dismiss defendant's appeal or affirm the judgment of the District Court on the grounds that no substantial question was raised for consideration on appeal and because of defendant's failure to comply with the mandatory provisions of Rule 9, of the Rules of the Circuit

Court of Appeals for the Seventh Circuit, no statement of points having been filed (R. 228-229, 239).

(c) The further question now involved is whether a Circuit Court of Appeals can substitute its discretion for that of the District Court under Rule 50b, Federal Rules of Civil Procedure following 28 U. S. C., section 723c, which discretion was exercised on said defendant's motion for directed verdict, without violating the letter and the spirit of the Seventh Amendment to the Constitution of the United States, no abuse of such discretion by the District Court appearing, Plaintiff duly petitioned for a re-hearing in the Circuit Court of Appeals and said petition was dismissed on August 4th, 1941 (R. 254).

II.

Jurisdiction of Supreme Court to Review on Writ of Certiorari.

1. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240, Judicial Code, 28 U. S. C. A. #347a), which provides that in any case, civil or criminal, in a Circuit Court of Appeals, it shall be competent for the Supreme Court of the United States, upon petition to grant certiorari to bring up the record for review with the same power and authority and with like effect as if the cause had been brought there on unrestricted appeal.

2. The judgment appealed from was entered on the 28th day of May, 1940 as appears from pages 225, 226, 227 of record, the printed record herein.

3. The petition herein seeks a review of a judgment and decision of the Circuit Court of Appeals in a civil action at law to recover the principal amount of a World War Veteran's policy, to review the determination that the issue

presented by defendant's affirmative defense of fraud in securing a reinstatement of said policy, was on the record in this case one of law for the court and not one of fact to be settled by the jury as appears from pages 246-253 of the printed record herein.

4. Jurisdiction of this Court for the Writ is invoked on the following grounds:-

a. Under Rule 50, subdivision b, Federal Rules of Civil Procedure, 28 U. S. C. A., following 723c, the District Court is vested with discretion under certain conditions to enter judgment contrary to the jury's verdict without granting a new trial. (Appendix) Can a Circuit Court of Appeals overturn the discretion of the District Court vested in said Court by law, under Rule 50b on a motion for directed verdict, review the facts, weigh the evidence, judge the credibility of witnesses and substitute its discretion for that of the District Court, and order said Court to grant a motion for directed verdict, when the record shows no abuse of such discretion by the District Court, when the very decision itself of said Circuit Court of Appeals actually admits that there was no abuse of such discretion? At pages 250-251 of its decision the Circuit Court states: "*A very close question is presented as to whether the record shows any question for the jury or whether misrepresentation was proved as a matter of law, entitling the government to a directed verdict in its favor.*" (Italics ours.)

Has the adoption of Rule 50b enlarged the powers of the Circuit Courts to review the facts? We respectfully invoke the jurisdiction of the Supreme Court for the issuance of a writ of certiorari in order to secure an authoritative construction of said Rule 50b to serve as a guide to future litigants on an important question of constitutional rights and judicial procedure involving the construction of

the Seventh Amendment to the United States Constitution guaranteeing jury trials, which has not been but should be decided by this Court and to secure uniformity of decision and to avoid and resolve conflicts in the various circuits.

b. Certiorari should be granted to resolve a conflict of decisions below and the conflict of decisions with those of other circuits on the same matter. The District Court denied defendant's motion for a directed verdict (R. 224-157) and its later motion for judgment *non obstante veredicto* (R. 215-217-224). The District Court and the circuit court reached different conclusions on the question of a directed verdict on the same record; and elsewhere, in other circuits there is diversity of opinion on the same matter. Judge Kerner, Circuit Judge, dissenting, stated that on the record the issue was a jury question (R. 253). In the public interest the writ should issue an order to secure uniformity of decisions on a question of general importance and peculiar gravity affecting as it does a large class of policy holders.

c. Rule 9, subsection 1, of the Rules of the Circuit Court of Appeals for the Seventh Circuit provides: "Where an appeal is taken to this Court, the appellant shall file with the clerk of the district court, for inclusion in the record on appeal, a statement of points which shall set out separately and particularly each error asserted and intended to be urged. *No appeal shall be considered, unless such statement of points shall have been so filed.*" (Italics ours) No such statement of points was so filed with the clerk of the District Court (R. 228, 229), as shown by defendant's "Designation of Contents of Record on Appeal". No such statement was filed on February 15th, 1941, long after the appeal was docketed in the Circuit Court of Appeals on or before November 24th, 1940 (R. 227, 228). On February 15th, 1941, plaintiff moved to dismiss defendant's appeal to the Circuit Court of Appeals because no substantial

question was raised for consideration on appeal and because defendant failed to comply with the provisions of said Rule 9 (R. 239). This motion was denied without prejudice to renew it on February 26th, 1941 (R. 245) and was later denied upon its renewal (R. 247).

Did this mandatory rule bind the Circuit Court adopting it as well as the appellant, or could the Circuit Court which adopted the rule waive its mandatory provisions in favor of appellant and consider the case, the record showing a clear violation of such rule by the defendant?

We invoke the jurisdiction of this Court for the writ because the Circuit Court's decision on this motion so far departs from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision and for a construction of the binding force of rules so adopted on the Court adopting them.

III.

Reasons Relied On for the Allowance of the Writ.

1. The decision of said Circuit Court of Appeals as to the holding that the District Court erred in not granting defendant's motion for a directed verdict at the close of the trial is a decision of an important federal question involving the interpretation of the Seventh Amendment to the United States constitution and also involving the construction of Rule 50b Federal Rules of Civil Procedure in its relation to said Seventh Amendment, which has not been but should be settled by this Court.

2. The decision and judgment of said Circuit Court of Appeals reversing the judgment of the District Court because the latter court refused to grant defendant respondent's motion for a directed verdict at the close of the trial is in conflict with the decisions of the Circuit Court of Ap-

peals for the Fifth Circuit, on the same matter, in the cases of:

Bailey v. United States, 92 F. (2d) 456, 458;
United States v. Thomas, 92 F. (2d) 929, 930;
United States v. Barton, 117 F. (2d) 540, 541;
United States v. Dickson, 92 F. (2d) 459;
United States v. Robins, 117 F. (2d) 145.

It is also in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit on the same matter in the case of:

Drew v. United States, 104 F. (2d) 939, 942;

and in conflict with the decisions of the Circuit Court of Appeals for the Eighth Circuit on the same matter in the cases of:

Jones v. United States, 112 F. (2d) 282, 286;
United States v. Dupire, 101 F. (2d) 945, 949;
Asher v. United States, 63 F. (2d) 20, 23;

and in conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit on the same matter in the cases of:

• *United States v. Hartle*, 99 F. (2d) 923, 925;
United States v. Smith, 117 F. (2d) 911, 912;
United States v. Fulkerson, 67 F. (2d) 288, 290.

3. The decision of the Circuit Court of Appeals as to denial of petitioner's motion to dismiss defendant's appeal or to affirm the judgment of the District Court because of said defendant's failure to comply with Rule 9 of said Court so far departs from the accepted and usual course of judicial procedure as to call for the exercise of this Court's power of supervision (R. 246-247).

IV.

The Cases Believed to Sustain Said Jurisdiction Are As Follows:

Berry v. United States, 311 U. S. —, 61 S. Ct. 637, 638;
Baltimore v. Carolina Line, Inc., 295 U. S. 654, 659;
Gunning v. Cooley, 281 U. S. 90, 94;
Slocum v. New York Life Ins. Co., 228 U. S. 364, 398;
Richmond & Danville R. R. Co. v. Powers, 145 U. S. 43, 45;
Strochmann v. Mutual Life Ins. Co., 300 U. S. 435, 440;
Aschenbrenner v. U. S. F. & G. Co., 292 U. S. 80, 82;
Magnum Co. v. Coty, 262 U. S. 159, 163.

WHEREFORE your petitioner prays that a writ of certiorari issue, under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 7516, Harriet V. Pence, Plaintiff-Appellee, v. The United States of America, Defendant-Appellant, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated, September 26th, 1941.

HARRIET V. PENCE,
 By WILLIAM B. COLLINS,
 Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 665

HARRIET V. PENCE,
Petitioner and Appellee Below,

vs.

THE UNITED STATES OF AMERICA,
Respondent and Appellant Below.

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

I.

Opinions of Courts Below.

The opinions in the District Court are set forth at pages 219 and 223 of the record but are not reported. The opinion of the Circuit Court of Appeals is set forth at pages 246 to 253 of the record and has been reported in 121 F. (2d) pages 804 to 809.

II.

Jurisdiction.

This has already been stated in the preceding petition under II (pp. 3 to 6) which is hereby adopted and made a part of this brief.

III.

Statement of the Case.

This has already been stated in the preceding petition under I (pp. 1 to 3) which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in reversing the District Court's ruling on defendant's motion for directed verdict.

2. The Circuit Court of Appeals erred in assuming that it had the power to disturb the discretion of the District Court exercised on defendant-respondent's motion for directed verdict, in the absence of an abuse of such discretion by said District Court.

3. The Circuit Court of Appeals erred in not granting petitioner's motion in said Court to dismiss defendant-respondent's appeal, because that Court never acquired jurisdiction, no statement of points having been filed in compliance with Rule 9 of said Court.

V.

ARGUMENT.**Summary of the Argument.**

Point A. The issue presented by the conflicting evidence in the record in this case was a question of fact for the jury.

Point B. The Circuit Court of Appeals by its decision has usurped the discretion vested by Rule 50b and the common law in the District Court and has violated the Seventh

Amendment to the Constitution of the United States by depriving petitioner of a jury trial.

Point C. Petitioner's motion to dismiss defendant's appeal should have been granted by the Circuit Court because that Court never acquired jurisdiction.

POINT A.

The issue presented by the conflicting evidence in the record in this case was a question of fact for the jury:

Lawrence Waldo Pence, while serving as a doctor in the United States Medical Service at the National Home at Wood, Wisconsin, on June 21st, 1927, applied for reinstatement of a Ten Thousand Dollar (\$10,000) World War Veterans' Policy (R. 169-171; Plaintiff's Exhibit 3). It had lapsed for non-payment of premiums on March 2nd, 1920 (R. 14). He was examined for re-instatement by a Government doctor, Joseph H. Plant, on June 25th, 1927, and recommended for re-instatement as a "1st Class Risk" (R. 173; Plaintiff's Exhibit 3, Question 21). The policy was re-instated as of July 1st, 1927, and all premiums paid to and including August, 1934 (R. 14). He died on September 21st, 1934 within the 31 day grace period of the policy (R. 14, 15). After disagreement, his widow and beneficiary sued the Government on the policy and the Government set up the affirmative defense of fraud in securing said re-instatement (R. 10).

The Government contends that Pence answered falsely certain questions in the application for re-instatement. These questions made inquiry as to whether he had had certain diseases (R. 171; Plaintiff's Exhibit 3, Question 11) and whether he had during the lapse of the policy consulted any doctors for illness (R. 169, Plaintiff's Exhibit 3, Question 7). He gave negative answers to both of these ques-

tions and the Government now contends that these answers were false (R. 10).

Beginning over a year after re-instatement of the policy on July 1st, 1927, Pence made other application to the Government of the United States for retirement, for compensation and vocational training and for pension in which he made statements in conflict with his answers in his application for re-instatement of his insurance (Defendant's Exhibit "J"; R. 98, 208) (Defendant's Exhibit "D"; R. 99, 197, 198) (Defendant's Exhibit "H"; R. 206, 207) (Defendant's Exhibit "F"; R. 201, 202) (Defendant's Exhibit "G"; R. 102, 203, 206) (Defendant's Exhibit "M"; R. 101, 211) (Defendant's Exhibit "K"; R. 209, 210) (Defendant's Exhibit "I"; R. 214) (Defendant's Exhibit "E"; R. 99, 100, 199, 200) (Defendant's Exhibit "L"; R. 100, 101, 210, 211). These Exhibits form the principal basis for defendant's defense of alleged fraud in securing the re-instatement.

The Government when acting upon these various claims of Pence had him examined by their doctors on several occasions and their medical reports up to November 12th, 1930, deny the existence of the ailments claimed by Pence. The first of these medical reports is Plaintiff's Exhibit 10, which shows the result of an examination of Pence on October 10th, 1928 (R. 184, 185). Other medical reports showing that Pence did not have the ailments he claimed in applications after re-instatement resulted from these examinations by Government doctors and are in evidence as Plaintiff's Exhibits as follows: (Plaintiff's Exhibit 13; R. 184, 185) (Plaintiff's Exhibit 14; R. 187, 188) (Plaintiff's Exhibit 15; R. 189, 190) (Plaintiff's Exhibit 18; R. 191, 192) (Plaintiff's Exhibit 9; R. 184) (Plaintiff's Exhibit 3; R. 172, Q. 7, R. 173, Q. 21) (Plaintiff's Exhibit 8; R. 182, 183).

The principal ailments claimed by Pence in his earlier examinations were acute sinusitis and myocarditis. When medical reports negated these claims he added other ailments in subsequent applications. But in each of these applications, Question 9 asked applicant to state all his ailments and at the end of each application and just above the signature of Lawrence W. Pence is the following: "My answers to Question 9 have been read to me and I hereby certify that the complaints herein recorded are all that I am suffering from to my knowledge" (R. 185, 186, 188, 190, 191).

In his first application upon which the medical report, dated October 10th, 1928, was made (Plaintiff's Exhibit 10; R. 184, 185) Pence claimed as follows: "9. Present complaint (subjective symptoms, not diagnosis): Sinusitis, Heart trouble, Shortness of breath on exertion, No precordial pain. No oedema" and at the end over his signature he certifies that that constituted all his complaints. But later on in his subsequent applications, Pence brings in appendicitis, duodenal ulcer, gastropstosis and constipation. In his application for compensation and vocational training dated August 27th, 1928, the first application after the re-instatement of the policy (Defendant's Exhibit "D"; R. 197, 199) under the heading "D, Medical survey", we find "he states he was never treated by any doctor since discharged from the army, had not been confined to bed or in hospital since his discharge" (R. 198). He later made conflicting statements after his applications were turned down and added new ailments. Defendant introduced a letter from Pence written by him on December 8th, 1933, after his applications had been made and apparently acted upon, in which Pence states that the Board of Appeals ridiculed and belittled his claims (Defendant's Exhibit "M"; R. 212, 213).

In Plaintiff's Exhibit 10, the medical report of Government doctors, dated October 10th, 1928, is the following: "X-ray shows all sinuses clear" and, "Heart: Diagnosis; Lessened Myocardial tone and reserve, Myocardial Degeneration beginning" (R. 185). But in Plaintiff's Exhibit 13, a medical report dated June 3rd, 1929, by Drs. Edward R. Ryan and Henry J. Kuhn, we find the following report on Pence's heart by the same doctor, Henry J. Kuhn who made the report of October 10th, 1928 shown in Plaintiff's Exhibit 10 (R. 184). Dr. Henry J. Kuhn states on June 3rd, 1929, in plaintiff's Exhibit 13 (R. 185, 186), as follows: "Examination: There is no objective evidence of respiratory or circulatory distress, heart not enlarged, not displaced, action regular, apex beat is not unusually forceful or heaving. Myocardial tone is fairly good. Sounds fairly well sustained. No unusual accentuations. Exercise fifty hops elicits no dyspnea of cyanosis. Tone continues good. No murmur, no thrill. Rate at rest is 80, after exercise 96, after two minutes 80. Blood pressure 130/90. Diagnosis: No definite cardiovascular disease noted" (R. 185, 186).

Dr. Edward R. Ryan made no report on sinusitis on June 3rd, 1929, although Pence claimed it in his application, though Dr. Ryan did report on other matter as an eye, ear, nose and throat specialist (R. 186, Plaintiff's Exhibit 13).

Other medical reports after June 3rd, 1929, varied somewhat but as late as February 27th, 1933, in a medical report by Government doctors at Hines, Illinois, Pence's sinuses were found normal.

"Sinuses: The roentgenological examination of the nasal accessory sinuses shows all sinuses to be clear and well aerated. There is no demonstrable X-ray evidence of pathology. Summary: Sinuses—normal" (Plaintiff's Exhibit 18, R. 196):

At the Government hospital at Hines, Illinois on February 27th, 1933, Dr. Edward W. Hollingsworth's clinical interpretations from an electrocardiogram of Pence's heart was as follows: "Suggested Myocardial Degeneration" (R. 193, Plaintiff's Exhibit 13). On cross-examination, Dr. Hollingsworth testified regarding this clinical interpretation as follows: "A.—I would be quite suspicious. I would not be sure" (R. 132). But on the same date, Dr. D. S. Levy, another Government doctor at Hines reported on Pence's heart as follows: "Pulses are equal, small, regular and synchronous with the heart beat. Radial arteries are soft and compressible. No murmurs. Heart tones normal. Pulse (recumbent)—88 B. P. 160/98. Pulse (erect) 88 B.P. 142/90. Pulse (after exercise) 100 Slight dizziness. No cyanosis or vertigo. BP. 156/96. Pulse (2" after exercise) 92 B.P. 160/98" (R. 191, Plaintiff's Exhibit 18).

This report of examination dated February 27th, 1933, was nearly six years after re-instatement and even then Government doctors were not sure about the condition of Pence's heart. One doctor suspected myocarditis; another apparently found the heart normal. In the case of *Lumbray v. United States*, 290 U. S. 551, 560 in referring to evidence of health subsequent to the lapse of a policy in an action for total and permanent disability this Court stated that evidence subsequent to the lapse of a policy will "be considered only for the purpose of determining his condition while the policy was in force." The evidence of these various medical examinations of Pence by the Government after re-instatement on July 1st, 1927, were introduced for the purpose of showing what Pence's health was at the time of his application for re-instatement on June 21st, 1927. Even if the medical reports subsequent to that time had shown some disease or ailment, that would not be proof of the fraud the defendant alleges and seeks to sustain. These statements of Pence in applications subsequent to re-in-

statement could not, under any circumstances be held to be conclusive evidence of fraud in the re-instatement as held by the Circuit Court of Appeals. All of the medical testimony in the quoted medical reports from Government doctors themselves negatives the existence of the ailments Pence claimed. These medical reports directly contradicted Pence's claims in applications subsequent to re-instatement. Government doctors found these claims false but the Government now takes the position that Pence's false claims in applications subsequent to re-instatement are true; that it therefore follows conclusively that Pence's answers to questions in the application for re-instatement were false and sustain their charges of fraud. Based on these conflicting statements alone it would seem the issue was a jury question.

But there were several medical examinations made by Government doctors prior to Pence's application of June 21st, 1927, for re-instatement that do show his condition at the time when such application was made. Petitioner showed that in the year 1924, Pence applied for a position with the medical service of the Government. (Plaintiff's Exhibit 8; R. 176, 182) On said application Pence was given two examinations by Government doctors—one by Royal F. French, on November 29th, 1924, and one by Dr. A. R. Pierce, on March 13th, 1925. (R. 182, 183) He was found physically fit and these two doctors found no disease of the heart or sinuses. In the medical report of Dr. Royal F. French on November 29, 1924, we find the following: "Examiner should consider and report on: sight, hearing,—heart disease—" "Describe fully any deviations from the normal, with their effect on function, if present: valvular heart diseases; is it fully compensated? *None*" (italics ours) (Plaintiff's Exhibit 8; R. 182)

Pence re-entered the medical service of the United States on March 1st, 1925, and worked steadily for the Government

until he died on September 21st, 1934. (R. 68, 70) He had a record of regular work during the entire period, being absent a day or two now and then with colds but not otherwise. (R. 27, 30, 33)

A Government doctor, Dr. Joseph H. Plant, examined Pence on his application for re-instatement of his policy on June 25th, 1927, and recommended Pence as a "1st Class Risk". (R. 173, Question 21; Plaintiff's Exhibit 3) In the "Medical Examiner's Report" filled out by Dr. Plant, question 7 is answered as follows: "7. After examination do you find any abnormality of the heart? No. Is it irregular? No. Does it intermit? No. Is there a murmur? No. (if any heart disability is found or suspected, complete special heart examination on reverse side)" (Plaintiff's Exhibit 3; R. 172) Dr. Plant was not produced as a witness at the trial.

In the examination of Pence by Dr. A. R. Pierce, on March 13th, 1925, the heart was negative as shown by answer to question 7; and question 15 with its answer which was as follows: "15. Give here a supplemental and complete description of every abnormality, disease, or physical defect, past or present: *None*." (Plaintiff's Exhibit 8; R. 183)

Pence was found to be in good health at the time of his honorable discharge from the military service on January 9th, 1919, claiming no disease or ailment and the Government finding none. (Plaintiff's Exhibit 9; R. 184) From the time he left the army on January 9th, 1919, down to the time of his death on September 21st, 1934, in addition to his regular duties as a physician, he worked large gardens, played ball, running the bases, played golf and horseshoe, hunted and fished, mowed his own lawn, rowed rapids and loved the outdoors. He was more active physically than men of his age and profession. (R. 29, 50, 56, 57)

All members of his family testified that he was never sick. (R. 34, 41, 44, 48, 49) He worked the day before he

died and was found dead in the morning (R. 33). No one knows what he died of as there was no attending physician (R. 78, 79) and there was no autopsy (R. 80). The statements which Pence made in his various applications subsequent to reinstatement, while evidence, are not conclusive proof, as held by the Circuit Court, that the statements made in his application for reinstatement were false. In the light of the other evidence in this case the statements made in application subsequent to reinstatement are false. They do not establish fraud in the reinstatement. That was a question to be settled by a verdict of the jury, the evidence being in conflict. At best for the defendant, it was on this record a question for the jury.

At page 6 (R. 251) of its decision, the court states that Pence had myocarditis for which he was treated by a camp physician who prescribed medication and rest and that therefore he gave false answers to the inquiry made in the eleventh question concerning diseases (R. 171). The court probably based its view on Pence's statement in an application subsequent to reinstatement. The camp doctor was not produced. Neither were any hospital records for the camp, although defendant's counsel was served with notice to produce all hospital records and medical reports (R. 113). The statement is in direct conflict with other statements made by Pence (R. 198).

In his application for vocational training dated August 27th, 1928, Pence names no doctors as having treated him (Question 18) and states he had not been confined to bed or in hospital since discharge (R. 198, Question 19). A few months after the alleged treatment at camp Pence was honorably discharged on January 9th, 1919 (R. 14) and claimed no disability at the time of discharge and was found by Government doctors to be in good health then (Plaintiff's Exhibit 9; R. 184). It is not likely that Pence thought

at the time that there was anything the matter with his heart, or he would have so claimed at the time of his discharge. Being a doctor himself the exercise he took from the time he was discharged on January 9th, 1919, until his death on September 21st, 1934, completely negatives the assumption that Pence ever had anything the matter with his heart or that he ever believed that he had.

But the court, at page 7 (R. 252) of its decision, states that this was a material misrepresentation and that it was one of the causes of his death seven years after reinstatement of the policy. No medical report by Government doctors found heart disease. Virtually all are to the contrary. Nor is it accurate to state that myocarditis or any heart trouble caused his death. There was no attending physician and Pence worked the day before he died (R. 33, 78, 79). There was no autopsy and no one knows the cause of death (R. 80). The death certificate, signed by a physician who never treated Pence, is of no evidentiary value. There may be many causes of sudden death.

Can Pence's statement that he had been treated at camp late in the year 1918 for myocarditis support a finding of fraud by Pence and determine conclusively as a fact that Pence had myocarditis? Why was Pence honorably discharged from the army on January 9th, 1919, a few months later without claiming any disease or disability and without Government doctors finding it? If true, why was it not found in any of the subsequent examinations of Pence's heart in 1924, in 1925 or in 1927 when the policy was reinstated or in 1929 or 1933? We submit that fraud cannot be grounded on such statement in view of all the evidence in this record.

The circuit court finds at page 6 (R. 251) of its decision that Pence's negative answer to the seventh question was

false (R. 169) and that Pence consulted a physician. Said question and answer are as follows:

"Have you been ill, or contracted any disease, or suffered any injury, or been prevented by reason of ill health from attending your usual occupation, or consulted a physician in regard to your health, since the lapse of this insurance? (Answer 'Yes' or 'No'). No. If so give dates and full particulars, including the name and address of physician " (R. 169).

In 1925 Pence was working in a government hospital at Sioux Falls, South Dakota. His mother died of cancer in the west (R. 38). He was not sick, but being around with doctors every day and being a doctor himself, his mother's death naturally worried him and he had a check-up to relieve his mind. He was not consulting any physician because of any illness or disability. That would seem to be what the question sought to find out and we submit that fraud can not be predicated on this fact in the absence of a showing of an intentional misrepresentation, if any such there was.

Reading the whole question, we believe that its object and purpose, as understood by Pence, was to find out whether the applicant for reinstatement had gone to a doctor because of any illness or pain and consulted him with reference thereto for the purpose of obtaining medical treatment or relief. It was for the jury, however, and not for the court to say whether Pence was guilty of intentional misrepresentation in answering this question as well as to decide which statements were true and which were false, which were innocently and which were fraudulently made.

(5th Cir.) *Bailey v. United States*, 92 F. (2d) 456, 458;
 (6th Cir.) *Drew v. United States*, 104 F. (2d) 936, 942;
 (8th Cir.) *Jones v. United States*, 112 F. (2d) 282, 286.

We respectfully submit that on the evidence in this record no fraud was proved and at best for defendant, the issue involved was a question of fact for the jury.

POINT B.

The Circuit Court of Appeals by its decision has usurped the discretion vested by Rule 50b and the common law in the District Court and has violated the Seventh Amendment to the Constitution of the United States by depriving petitioner of a jury trial.

On the very face of its decision the Circuit Court of Appeals has violated the Seventh Amendment to the Constitution and the spirit and letter of subdivision (b) of Rule 50, Federal Rules of Civil Procedure. This rule merely restates as a rule of procedure in District Courts under certain conditions a practice which had existed under the common law. *Baltimore & C. Line v. Redman*, 295 U. S. 654, 659). The Seventh Amendment to the Constitution of the United States provides:

"In suits at common law where the amount in controversy shall exceed Twenty dollars the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules of the common law." (Italics ours.)

The Circuit Court in its decision holds:

"A very close question is presented as to whether the record shows any question for the jury, or whether misrepresentation was proved as a matter of law, entitling the Government to a directed verdict in its favor" (R. 250-251). (Italics ours.)

If it was a very close question as stated by that court and as supported by the record, it was not a question of law for the court but a question of fact to be settled by

the verdict of a jury. For the Circuit Court under these circumstances to overturn the discretion of the District Court, proceed to weigh the evidence, judge the credibility of witnesses, decide which statements of Pence were true and which were false, ignore the medical reports of Government doctors introduced by the plaintiff, ignore his steady habits of work for the Government from March 1st, 1925 until he died on September 21st, 1934, his habits of life including a great variety of outdoor exercise, the statements of his family and others that he never was sick, never complained about his health, was clearly to usurp the constitutional function of the jury to try and decide facts and to violate the Seventh Amendment to the Constitution. If it was a close question it should have been resolved against the Government because it had the burden of proof on its affirmative defense of fraud. If it was a close question then the discretion of the District Court acting under Rule 50b should not have been disturbed. The power to decide in first instance whether there was any substantial evidence to support the jury's verdict was vested by law and expressly by Rule 50b in the District Court which had the advantage of hearing the witnesses and better judging the weight and the credibility of their testimony. The Circuit Court could not disturb the discretion of the District Court on the question of a motion for directed verdict unless there was an abuse of that discretion—unless the District Court committed error as a matter of law; unless there was no substantial evidence upon which to support the verdict of the jury. And in considering defendant's motion for directed verdict, all undisputed facts, proved by petitioner and all reasonable inferences, deductions and conclusions to be drawn therefrom which are favorable to the beneficiary of the policy are to be regarded as true.

Stroehmann v. Mutual Life Ins. Co., 300 U. S. 435, 440;

Lumbra v. United States, 290 U. S. 550, 553;

Gunning v. Cooley, 281 U. S. 90, 94;

Richmond & Danville R. R. v. Powers, 149 U. S. 43, 45.

Where uncertainty as to the existence of fraud arises from a conflict in the testimony or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law for the court but one of fact to be settled by a jury. Kerner, Circuit Judge, dissenting, stated that on the record the issue was a jury question (R. 253). On the record in the two courts thus far, we have on this question of directed verdict, two district judges with opposite views and two circuit judges with opposite views. There was a conflict in the evidence on the trial making the issue a jury question, as evidenced and emphasized by the fact that fair-minded men, two district judges and two circuit judges honestly drew different conclusions on the question of directed verdict.

Petitioner had a verdict of a jury and the judgment of the trial court. That verdict could not under the Seventh Amendment to the Constitution of the United States and according to the practice of common law embodied in Rule 50b be otherwise re-examined in any court of the United States than according to the rules of the common law. The safeguards and inhibitions of the Seventh Amendment were cast aside, the verdict was not re-examined according to the rules of common law, the substantial evidence in the record supporting the verdict was ignored or explained away, the Circuit Court substituted its discretion for that of the District Court, usurped the function of the jury; and thus deprived petitioner of her constitutional right to a jury trial. Referring to Rule 50b this Court very recently held that the rule had not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being a constitutional tribunal provided for trying facts in courts of law.

Berry v. United States, 311 U. S. —, 61 S. Ct. 637, 638.

Some years ago this Court held that it may be if we were to usurp the functions of the jury and determine the weight to be given to the evidence we might arrive at a different conclusion.

Aetna Life Ins. Co. v. Ward, 140 U. S. 76, 91.

That is just what, in our opinion, the Circuit Court of Appeals has done in this case.

We respectfully submit that the Circuit Court of Appeals erred in disturbing the discretion of the District Court on the question of directed verdict.

POINT C.

Petitioner's motion to dismiss defendant's appeal should have been granted by the Circuit Court because that court never acquired jurisdiction.

(a) Petitioner's brief on motion in the Circuit Court of Appeals showed that the issue presented was a jury question and that defendant had raised no substantial issue for consideration on appeal (Point A this brief, pp. 11 to 21).

(b) Petitioner's motion to dismiss defendant's appeal should have been granted because of defendant's failure to comply with subdivision 1, Rule 9, of the Rules of the Circuit Court of Appeals for the Seventh Circuit. Said rule is as follows:

"1. Where an appeal is taken to this court, the appellant shall file with the Clerk of the District Court, for inclusion in the record on appeal, a statement of points which shall set out separately and particularly each error asserted and intended to be urged. *No appeal shall be considered, unless such statement of points shall have been so filed.*" (Italics ours.)

No such statement of points was *so filed* with the Clerk of the District Court as shown by defendant's "Designation

of Contents of Record on Appeal" (R. 228, 229). No such statement of points was filed on February 15th, 1941, long after the appeal was docketed in the Circuit Court of Appeals on or before November 24th, 1940 (R. 227-228). On February 15th, 1941, petitioner moved to dismiss defendant's appeal to the Circuit Court of Appeals because no substantial question was raised for consideration on appeal and because defendant failed to comply with the provisions of said Rule 9 (R. 239). This motion was on February 26th, 1941, denied without prejudice to renew it (R. 245) and was later denied upon its renewal (R. 246-247). This rule was made mandatory by its provisions. It had the force and effect of law. The Circuit Court of Appeals could not consider this case because of defendant's failure to comply with the rule and this appeal was never properly before the Circuit Court of Appeals for its consideration.

Rule 9 of the Circuit Court of Appeals for the Seventh Circuit became effective November 10th, 1939. The power to make the rule was conferred upon the court by law, Judicial Code, section 122 (28 U. S. C. A. section 219). It is as follows:

"Each circuit court of appeals shall prescribe the form and style of its seal, and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction; and shall have the power to establish all rules and regulations for the conduct of the business of the Court within its jurisdiction as conferred by law.

March 3, 1891, C517, #2, 26 Stat. 826;

March 3, 1911, C231, #122, 36 Stat. 1132."

A rule of the court thus authorized and made has the force of law and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. But the rule once made without any qualification must be applied to all cases

which come within it, until it is repealed by the authority which made it.

Rio Grande Irrigation Co. v. Gildersleeve, 174 U. S. 603, 608;

Thompson v. Hatch, 3 Pick. 512;

Weil v. Neary, 278 U. S. 160, 168, 169.

While, of course, the rules of court bind the judges of the court as much as its litigants.

Clawans v. Whitford, et al., 55 F. (2d) 1037, 1038.

Certiorari denied in this case 287 U. S. 605.⁸

Not having been so filed before the record was sent up on appeal, a statement of points could not thereafter be filed in compliance with the rule and the appeal never properly came before the Circuit Court of Appeals. The Circuit Court of Appeals in its decision of July 2nd, 1941, denied plaintiff's motion to dismiss and cites the case of *Adams, et al. v. N. Y. Chicago & St. Louis R. R. Co.* decided by it on May 20th and June 24th, 1941 (121 F. (2d) 808, 809) but the decision shows that the cited case related to Rule 75(d), Federal Rules of Civil Procedure. Even the Circuit Court of Appeals for the Seventh Circuit seems to sustain our position in an earlier case in discussing Rule 9. (R. 246-247) Appendix.

Keeley v. Mutual Life Ins. Co., 113 F. (2d) 633, 636.

We are at a loss to understand how a decision involving the construction of Rule 75d, Federal Rules of Civil Procedure can serve as any precedent for the construction of Rule 9 of the Circuit Court of Appeals. We do know, however, that there is no such language used in Rule 75d as we find at the end of subdivision 1, Rule 9, Circuit Court of Appeals.

We respectfully submit that because of defendant's failure to comply with the provisions of subdivision 1, Rule 9,

Circuit Court of Appeals for the Seventh Circuit, defendant's appeal never properly reached said Court and that our motion to dismiss should have been granted.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

WILLIAM B. COLLINS,
Counsel for Petitioner.

APPENDIX.**Federal Rules of Civil Procedure.****Rule 50(b) RESERVATION OF DECISION ON MOTION:**

"Whenever a motion for directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of the verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

Rule 75(d) STATEMENT OF POINTS:

"If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal."

Office - Supreme Court U. S.
FILED
MAR 2 1942
CHARLES ELMOSE CAMPBELL
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 665

HARRIET V. PENCE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF PETITIONER.

WILLIAM B. COLLINS,
Counsel for Petitioner.

INDEX.

SUBJECT INDEX.

	Page
Opinions of courts below	1
Jurisdiction	1
Statement of case	2
Specification of errors	2
Argument	2
Summary of argument	2
Point A—The issue presented by the conflicting evidence in the record in this case was a question of fact for the jury	3
Point B—The Circuit Court of Appeals by its decision has usurped the discretion vested by Rule 50b and the common law in the District Court and has violated the Seventh Amendment to the Constitution of the United States by depriving petitioner of a jury trial	8
Point C—Petitioner's motion to dismiss defendant's appeal should have been granted by the Circuit Court because that court never acquired jurisdiction	10

TABLE OF CASES CITED.

<i>Charter Shipping Co. Ltd., v. Browning Jones & Tidy, Ltd.</i> , 281 U. S. 515, 517	10
<i>Gen. Im. Co. v. Lake S. R. R.</i> , 260 U. S. 261, 281	10
<i>Graves v. Mt. Vernon T. Co.</i> , 69 F. (2d) 101	9
<i>Gunning v. Cooley</i> , 281 U. S. 90, 94	7
<i>Halliday v. United States</i> , 62 Sup. Ct. 438, 441	7
<i>Hartford Empire Co. v. Obearnestor Glass Co.</i> , 95 F. (2d) 414, 424	9
<i>Lumbra v. United States</i> , 290 U. S. 550, 553	7
<i>Newton v. Con. Gas Co.</i> , 258 U. S. 165, 177, 178	10
<i>Pence v. United States</i> , 121 F. (2d) 804, 807	3, 4, 5, 7
<i>Pilot Life Ins. Co. v. Habis</i> , 90 F. (2d) 842, 844	9

	Page
<i>Railroad Co. v. Fraloff</i> , 100 U. S. 24, 31	10
<i>Richmond & Danville R. R. v. Powers</i> , 149 U. S. 43, 45	7
<i>Runkle v. United States</i> , 42 F. (2d) 804, 807	5
<i>Schweitzer v. Fox</i> , 226 Wis. 26, 32	4
<i>Strochman v. Mut. Life Ins. Co.</i> , 300 U. S. 435, 440	7
<i>Third National Bank v. United States</i> , 53 F. (2d) 599, 602	6
<i>Wabash Ry. Co. v. McDaniels</i> , 107 U. S. 454	9

TEXT BOOKS CITED.

4 C. J. No. 2830, Appeal and Error, pp. 842, 844	9
4 C. J. No. 2830, Appeal and Error, pp. 849, 856	9
5 C. J. S. No. 1612, pp. 1612, 1613	9

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 665

HARRIET V. PENCE,

Petitioner and Appellee Below,

vs.

THE UNITED STATES OF AMERICA,

Respondent and Appellant Below.

BRIEF OF PETITIONER.

I.

Opinions of Courts Below.

The opinions in the District Court are set forth at pages 219 and 223 of the record but are not reported. The opinion of the Circuit Court of Appeals is set forth at pages 246 to 253 of the record and has been reported in 121 F. (2d) pages 804 to 809.

II.

Jurisdiction.

This has already been stated in the preceding petition under II (pp. 3 to 6) which is hereby adopted and made a part of this brief.

III.

Statement of the Case.

This has already been stated in the preceding petition under I (pp. 1 to 3) which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in reversing the District Court's ruling on defendant's motion for directed verdict.

2. The Circuit Court of Appeals erred in assuming that it had the power to disturb the discretion of the District Court exercised on defendant-respondent's motion for directed verdict, in the absence of an abuse of such discretion by said District Court.

3. The Circuit Court of Appeals erred in not granting petitioner's motion in said court to dismiss the defendant-respondent's appeal, because that court never acquired jurisdiction, no statement of points having been filed in compliance with Rule 9 of said court.

V. ARGUMENT.

Summary of the Argument.

Point A. The issue presented by the conflicting evidence in the record in this case was a question of fact for the jury.

Point B. The Circuit Court of Appeals by its decision has usurped the discretion vested by Rule 50 b and the common law in the District Court and has violated the Seventh Amendment to the Constitution of the United States by depriving petitioner of a jury trial.

Point C. Petitioner's motion to dismiss defendant's appeal should have been granted by the Circuit Court because that court never acquired jurisdiction.

POINT A.

The issue presented by the conflicting evidence in the record in this case was a case of fact for the jury.

In addition to the argument on this point set forth on pages 11 to 21 in our Brief on petition for the writ of certiorari, we wish to add the following.

The decision of the Circuit Court of Appeals seems to be based largely on the fact that Pence had made statements after re-instatement conflicting with statements made in said application. The Circuit Court states, "Certainly, it appears to us that the government is entitled to rely upon statements furnished by Pence for a different purpose, to prove the falsity of the information furnished for the purpose of re-instating the policy."

Pence v. United States, 121 F. 2d 804, 807.

By "rely upon statements" the Circuit Court really means that these statements prove the falsity of the statements in the application for re-instatement. Said court actually holds that these statements prove such falsity conclusively. Wouldn't it be just as logical to say that the statements made in the application for re-instatement prove conclusively the falsity of the statements made by Pence in his applications subsequent to re-instatement? All the facts and circumstances in this entire record should be considered in any determination of the question of whether Pence made false statements in his application for re-instatement. We submit that no mere statement can ever prove as a fact that which may or may not be a fact. Where we have conflicting statements, the decision as to which statements were false and which were true, is a clear cut

decision of a question of fact. When the Circuit Court decides this question of fact, is it not directly depriving the plaintiff of her right to a jury trial guaranteed by the Seventh Amendment to the Constitution of the United States?

The correct decision is one of two alternatives; both must be considered in arriving at any decision; but the court directly brushes aside and excludes one alternative—that the statements of Pence in the applications subsequent to re-instatement are false and are shown to be false by all the other evidence in the record—and elects without argument or discussion to stand upon the other alternative. It directly decides with positive finality that the statements in the application for re-instatement are false. It assumes that certain statements are true and because of this assumption finds that other statements are false. It decides a fact.

It has been held in Wisconsin that statements obtained from a party on an adverse examination or otherwise prior to the trial which are at variance or even in conflict with the testimony in the trial present at most a contradictory state in the evidence and it is within the province of the jury to decide which statement is correct.

Schweitzer v. Fox, 226 Wis. 26, 32 and cases there cited.

We believe the District Court in the case at Bar was right when it stated as quoted by the Circuit Court regarding these subsequent statements as follows:

“They were proper evidence from which the Jury might have come to the conclusion that Dr. Pence answered falsely questions 7 and 11 in his application for re-instatement”.

Pence v. United States, 121 F. (2d) 804, 807.

The district court would permit the Jury and did permit the Jury to exercise its constitutional function. The circuit court would not. So we submit the circuit court was

in error when it continued: "We do not agree with this interpretation of the evidence. It appears to us that the facts pointed out above prove beyond question, not that the insured *might have* answered falsely, but that he *did* answer falsely in the particulars mentioned."

Pence v. United States, 121 F. (2d) 804, 807.

But standing in the way of this conclusion of the circuit court were several medical reports by government doctors made after Pence was examined on his applications subsequent to re-instatement. (The court at this stage of the argument omits mention of all medical examinations prior to the re-instatement of July 1, 1927 and to the most important medical report in the case—the one of Dr. Joseph Plant on the application for re-instatement dated July 25, 1927.) These reports show that Pence did not have the diseases he claimed. They show that the statements made in the applications subsequent to his re-instatement were false. They tend to prove that the statements made in the application were true. Having decided the fact by electing to stand on the one alternative—how was this evidence met by the Circuit Court of Appeals? We quote:

"It must be remembered that to be entitled to the relief claimed, Pence had to be *disabled* by the diseases and ailments with which he was afflicted, to whatever extent required by the regulations, while to be disentitled to the re-instatement of the policy, he had merely to *have* the diseases and ailments."

Pence v. United States, 121 F. (2d) 804, 807.

We did not and could not introduce any reports of boards which do pass on the percentage of disability required by regulations for relief sought. We could not do that under the very decisions of the circuit court. We tried to do so and were confronted with decisions (R. 85, 86, 87, 88).

United States v. Golden, 34 F. (2d) 367, 370;

Runkle v. United States, 42 F. (2d) 804, 807;

Third National Bank v. United States, 53 F. (2d) 599, 602.

We introduced the medical reports of government doctors who examined Pence on his applications subsequent to re-instatement.

They deal specifically with the presence or absence of the ailments claimed in Pence's applications—not with any percentage of disability. These medical reports differ from reports of boards in that they do not consider any percentage of disability. Pence claimed principally in all earlier applications that he had acute sinusitis and myocarditis. The medical reports down to Nov. 12, 1930 found he didn't have either of them. There is not a word about percentage of disability in any medical report we introduced as an exhibit. We submit that the part of the circuit court's decision above quoted does not meet the evidence of the medical reports at all. These reports show that Pence did not have at all—in any percentage whatever—any of the diseases he claimed. They tend to show that the statements in his application for re-instatement are true. Taken with the medical examinations prior to re-instatement and all the facts in the record in this case the issue was clearly a Jury question and the verdict of the Jury is supported by substantial evidence in the record.

But aside from these statements in medical reports on examinations subsequent to re-instatement how can the Court reconcile or justify the quoted part of its decision with the medical reports of Pence's condition in all the examinations prior to his re-instatement of July 1st, 1927? How can the Court utterly disregard and entirely ignore the report of the medical examination of Dr. Jos. H. Plant on June 25th, 1927? This was made by a government doctor four days after Pence's application for re-instatement and was had to determine Pence's state of health at the time of re-instatement and because of the application for

re-instatement, Dr. Jos. H. Plant after examination recommended Pence as a "1st class risk" (R. 173; Plaintiff's Exhibit 3, Question 21). We submit that this report alone makes the issue a jury question.

In the "Medical Examiner's Report" filled out by Dr. Plant, question 7 is answered as follows: "7. After examination do you find any abnormality of the heart? No. Is it irregular? No. Does it intermit? No. Is there a murmur? No. (if any heart disability is found or suspected, complete special heart examination on reverse side.)" Plaintiff's Ex. 3; R. 172.

Why did the circuit court ignore the results of the examinations of Dr. A. R. Pierce and Dr. Royal F. French in Mar., 1925, and Nov., 1924? (Plff's. Ex. 8, R. 182, 183) Why ignore the fact that at the time of his discharge on Jan. 9, 1919, Pence claimed no disease or disability and the government doctors found none? This was only a month or two after the alleged myocarditis at camp (Plff's. Ex. 9, R. 184), upon which the circuit court seems to rely.

Pence v. United States, 121 F. (2d) 804, 807.

Are not all these things and many others in this record substantial evidence which support the jury's verdict for the plaintiff? In the light of the rules of law governing—that in considering defendant's motion for directed verdict, all undisputed facts proved by petitioner and all reasonable inferences, deductions and conclusions to be drawn therefrom which are favorable to the plaintiff against whom the motion is made are to be regarded as true—

Strochman v. Mut. Life Ins. Co., 300 U. S. 435, 440;

Lumbra v. United States, 290 U. S. 550, 553;

Gunning v. Cooley, 281 U. S. 90, 94;

Richmond & Danville R. R. v. Powers, 149 U. S. 43, 45;

Halliday v. United States, 62 Sup. Ct. 438, 441 (Jan. 19, 1942)

did not the circuit court err in disturbing the discretion of the district court and ordering said court to grant the motion for a directed verdict?

POINT B.

The Circuit Court of Appeals by its decision has usurped the discretion vested by Rule 50b and the common law in the District Court and has violated the Seventh Amendment to the Constitution of the United States by depriving petitioner of a jury trial.

We have pointed out that there was no abuse of discretion by the trial court. The decision of the Circuit Court of Appeals virtually admits this (p. 21, 22 Brief on Petition). Does an appellate court have a right to disturb the discretion, no abuse in its exercise appearing? The province of appellate courts is generally limited to the correction of errors of law and, as a general rule, they cannot review the findings of fact of juries or of trial courts. The probative force of evidence is for the consideration of the jury, who are the triers of fact in the court below, and the appellate court cannot consider the weight of the evidence nor the credibility of witnesses. Where there is any evidence to support the findings or the verdict or where the evidence is in conflict and would support a finding either way, the verdict of a jury based thereon and approved by the trial court will not be disturbed unless there is an entire lack of substantial evidence either direct or inferential. The mere difference of opinion between the reviewing court and the trial judge or the jury regarding the weight of the evidence or the credibility of witnesses furnishes no ground for disturbing the discretion of the trial court where the exercise of that discretion is free from abuse and there is substantial evidence to sustain the discretion of the trial court and the verdict of the jury.

4 C. J., #2830 Appeal and Error, pp. 843, 845.

Where the trial court is vested with discretion on a motion to direct a verdict and has exercised that discretion it will not be disturbed on appeal unless such discretion has been abused.

5 C. J. S. #1612 pp. 1612, 1613.

Graves v. Mount Vernon T. Co., 69 F. (2d) 101 (2nd Cir.)

Pilot Life Ins. Co. v. Habis, 90 F. (2d) 842, 844 (4th Cir.)

Hartford-Empire Co. v. Obearnestor Glass Co., 95 F. (2d) 414, 424. (8th Cir.)

In the last case above cited (*Hartford-Empire Co. v. Obearnestor Co.*, 95 F. (2d) 414, 424), the court in referring to whether there was an abuse in the exercise of discretion by the trial court states:

“This guiding principle for an appellate court is not what it may think the jury ought to have done, or what such court may think it would have done had it been sitting as a jury in the case, but whether as reasonable men the jury could have found such verdict from the evidence adduced.”

4 C. J. #2830 pp. 849 to 856.

This Court has held that it is without authority to disturb a judgment upon the grounds that the damages are excessive and that whether the order overruling the motion for a new trial, based upon that ground, was erroneous or not, our power is restricted to the determination of questions of law arising upon the record.

Wabash Ry. Co. v. McDaniels, 107 U. S. 454, 2 Sup. Ct. 932, 934.

This Court has always held that the discretion to pass upon the question of excessive damages belongs to the trial court; that when the trial court reviews the case and

refuses to disturb the verdict and finds that the jury performed their duty impartially and justly it will not disturb the discretion of the trial court. It has further held that whether or not the action of the trial court in overruling a motion for a new trial was erroneous "our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a reexamination of facts which have been tried by the jury under instructions correctly defining the legal rights of the parties."

Railroad Co. v. Fraloff, 100 U. S. 24, 31.

This Court has held that the district court's determination of its jurisdiction in an action for libel was the exercise of a discretion not to be disturbed upon appeal unless abused.

"The retention of jurisdiction of a suit in admiralty between foreigners is within the discretion of the District Court, the exercise of its discretion may not be disturbed unless abused. *The Belgenland*, 114 U. S. 355, 368; *The Maggie Hammond*, 19 Wall. 425, 457."

Charter Shipping Co. Ltd. v. Bowring, Jones & Tidy Ltd, 281 U. S. 515, 517.

See also *Gen. Inv. Co. v. Lake S. R. R.*, 260 U. S. 261, 281.

Newton v. Con. Gas Co., 258 U. S. 165, 177, 178.

POINT C.

Petitioner's motion to dismiss respondent's appeal should have been granted by the Circuit Court because that court never acquired jurisdiction.

We pointed out in our brief on Petition for Writ that respondent failed to comply with Rule 9, subd. 1, of the Rules of the Circuit Court of Appeals for the Seventh Circuit (Brief on Pet. pp. 24 to 27). We do not care to add to the argument on this point. Although we do not

abandon this point we prefer to rest our cause on the merits, but we believe that the court below as well as the litigants were bound by this rule.

Conclusion.

It is therefore respectfully submitted that this Court should reverse the decision of the Circuit Court of Appeals and reinstate the judgment of the District Court and grant such other relief as it may deem just.

Respectfully submitted,

WILLIAM B. COLLINS,
Counsel for Petitioner.

(8937)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 665

HARRIET V. PENCE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

WILLIAM B. COLLINS,

Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 665

HARRIET V. PENCE,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

REPLY BRIEF OF PETITIONER.

Petitioner Did Not Consult a Physician in Regard to His Health Between March, 1920, and June, 1927.

Respondent in its brief under A, page 15-21, contends that Pence, the insured, did consult a physician during this period of lapse and that his representation to the contrary in his application for reinstatement was fraudulent. Respondent relies chiefly on the affidavit and the testimony of Dr. Grant Glickman.

Dr. Glickman was not an eye, ear, nose and throat man (R. 111). He finished his internship in 1925 and began working for the Government as a roentgenologist interpreting X-rays in 1926, in which capacity he was serving at the time of the trial (R. 113). An X-ray of Pence's sinuses was taken by a Government doctor at the Milwaukee Home

on 10-10-28, which showed (Plff's. Ex. 10, R. 185) "X-ray shows all sinuses clear" (R. 115). Dr. Glickman testified that X-rays taken by him of Dr. Pence at the National Home, Milwaukee, Wisconsin, on 11-12-30 showed Pence had sinusitis (R. 111), but when confronted with Plff's. Ex. 14 (R. 188) admitted that the report in that exhibit was correct. Over his signature in that report on these X-rays is the following:

"Examination of accessory nasal sinuses reveals them as being normal" (R. 116).

Pence did not call Dr. Glickman to treat him at the National Home at Leavenworth, Kansas, between Jan. 16 and Jan. 26, 1927. The latter stated it was his official duty as officer of the day to call upon and treat Pence (R. 118-119). Harriet V. Pence denied that Pence ever consulted a physician with regard to his health between Feb. 1, 1920, and July 1, 1927. (R. 26), and denied that he was ever incapacitated during that period by any sickness, though he did have some colds (R. 27). She stated that he contracted colds from working over patients who had colds (R. 36). Dr. Glickman testified that she was present at the home when he treated Pence (R. 114).

Dr. Glickman testified that he made a written record at Leavenworth of these alleged treatments of Pence; that he did this as Officer of the Day, but Mr. Lytle, Counsel for defendant on the trial, stated that he had no such records and that he had a letter from Leavenworth, Kansas, stating that they had no such records. Counsel for defendant had been served with a notice to produce all such medical records while Pence was in the service (R. 113). Government records are not often lost or mislaid and the jury had a right to doubt the credibility of Dr. Glickman as a witness under all these circumstances; they had a right to believe that this Doctor signed the affidavit in Sept., 1928, in fur-

therance of a scheme to help Pence unjustly and that he thereafter felt he had to stand by his affidavit. The jury had a right to believe that an experienced E. E. N. & T. doctor like Pence would be quite unlikely either to call an X-ray man for such highly specialized treatment or to subject or submit himself to treatment at the hands of one as poorly qualified for such treatment as was Dr. Grant Glickman. They were the judges of the weight of this evidence and the credibility of these witnesses.

Dr. Burke, who is referred to on pages 18 and 24 of respondent's brief, never treated Pence professionally or was never consulted professionally by Pence and never made an examination of him (R. 126). Pence told Dr. Burke that "he wanted to get out of this practice because it was too hard being up nights and making calls and all that;" (R. 126). He further testified that (Pence) "he felt he wanted to get out where he wouldn't be getting out nights and working—yes, he wanted to get out of private practice. He gave me that reason for leaving. He was going into the government service if he could" (R. 126). * * * "Well, because it was too hard, and he had too many headaches." * * * "You see, a country practice is a pretty tough practice for anybody, and you get out any time, of course; any kind of weather, and that is pretty bad weather. We had bad roads out there in that country in '22 and '23." (R. 126); that he "wouldn't care to go into a country practice on roads like that." (R. 126)

In answer to the court's question Dr. Burke testified that primarily he wouldn't think a treatment for sinusitis would come under the classification of "disease of throat or lungs" (R. 126) referred to in question 11 (R. 171).

Dr. Royal F. French did testify that he treated Pence for sinusitis in the year 1919, but that was before the policy lapsed in March, 1920 (R. 123), and Dr. Burke tes-

lified that primarily that would not be classified as a disease of the throat or lungs (R. 126, 127).

Is it any wonder that Pence, who was approaching the age of fifty in 1922 and 1923, wanted to get out of private practice and away from midnight trips over bad country roads of Iowa in the year 1924 and 1925? Is it any wonder that he had a few colds with the very common touch of sinus trouble accompanying them? Who among us would not have been affected in like manner under the circumstances? A cold is not a disease and many persons have colds and do not consider them a disease.

We respectfully submit that Pence was not guilty of any fraud in his answers to questions in the application for reinstatement signed on June 21, 1927.

The Seventh Amendment to the Constitution Has Been and Should Be Preserved.

We have pointed out in our preceding briefs that this Court has always sacredly given force and effect to the Seventh Amendment to the Constitution of the United States; that it has carefully exercised the power of an appellate court and has refrained from usurping the functions of the jury and the trial court. In our humble judgment circuit courts of appeal are bound by the same constitution and are likewise restricted in the exercise of their functions. So, too, the Congress of the United States has respected the Constitution and the Bill of Rights.

A few years ago when the Congress of the United States granted to this Court the power to revise the Federal Rules of Civil Procedure it was mindful of the sanctity of the Seventh Amendment to the Constitution of the United States. The law which conferred that power upon this Court is known as "The Act of June 19, 1934, Ch. 651"

and is found set forth in every official copy of "Rules of Civil Procedure for the District Courts of the United States" at page vii. Section 2 of said act provides that this Court may unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both. "Provided, however, That in such union of rules the right of trial by jury as at common law and declared by the Seventh Amendment to the Constitution shall be preserved to the parties inviolate. * * *". [Act of June 19, 1934, C. 651, §§ 1, 2 (48 Stats. 1064), U. S. C., Title 28, §§ 723b, 723c.] In veterans' cases alone, twice during the past year this Court has shown its high regard for the Seventh Amendment to the Constitution.

Berry v. United States, 312 U. S. —, 61 S. Ct. 637, 638;

Halliday v. United States, 62 S. Ct. 438, 441.

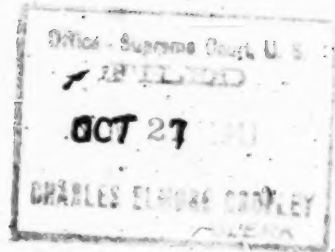
With such "eternal vigilance" our liberties are secure.

Respectfully submitted,

WILLIAM B. COLLINS.

(9243)

FILE COPY



No. 665

In the Supreme Court of the United States

OCTOBER TERM, 1941

HARRIET V. PENCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO
THE PETITION FOR A WRIT OF CERTIORARI

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 685

HARRIET V. PENCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO
THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the district court (R. 219-222) is not reported. The opinions of the circuit court of appeals (R. 249-256) are reported in 121 F. (2d) 804.

JURISDICTION

The judgment of the circuit court of appeals was entered on July 2, 1941 (R. 257) and a petition for rehearing was denied on August 4, 1941 (R. 258). The petition for a writ of certiorari was filed on September 29, 1941. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the evidence requires a finding that the insurance policy sued on was obtained by fraud.

2. Whether, because of lack of timely compliance with the provisions of its Rule 9, requiring the filing of a statement of points, the circuit court of appeals was without jurisdiction to permit late compliance with the rule and to hear and determine the appeal on its merits.

PERTINENT RULES OF COURT

Rule 9 of the Circuit Court of Appeals for the Seventh Circuit provides in part as follows:

1. Where an appeal is taken to this court, the appellant shall file with the clerk of the district court, for inclusion in the record on appeal, a statement of points which shall set out separately and particularly each error asserted and intended to be urged. No appeal shall be considered, unless such a statement of points shall have been so filed.

Rule 75 (h) of the Rules of Civil Procedure for the district court provides:

POWER OF COURT TO CORRECT RECORD. It is not necessary for the record on appeal to be approved by the district court or judge thereof, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, of the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supple-

mental record shall be certified and transmitted by the clerk of the district court.

STATEMENT

Petitioner, widow and beneficiary of insured (R. 2, 3), brought suit on a contract of United States Government life (converted) insurance, issued to Lawrence W. Pence on July 1, 1927. The insured, an eye, ear, nose and throat specialist, was a medical officer in the military service of the United States from August 7, 1918, to January 9, 1919 (R. 14), and during that period he obtained a \$10,000 contract of yearly renewable term insurance which lapsed for nonpayment of the premium due February 1, 1920 (R. 14).

The policy now sued on was obtained by reinstatement and simultaneous conversion of the lapsed term policy (R. 169-181, 206-207). Premiums were paid on the converted policy from the date of its issuance in 1927 through the month of August 1934. The insured died on September 21, 1934, during the grace period of 31 days allowed for payment of the premium due on September 1, 1934 (R. 14-15). The only issue presented in the district court was raised by the Government's affirmative defense that the policy was void because obtained by fraud (R. 10).

A jury trial on this issue resulted in a verdict for the petitioner (R. 218). Respondent's motion for a directed verdict, made after all of the evidence had been introduced (R. 157), and its motion for judgment, made after the verdict was returned (R. 215, 217), upon the ground that the evidence required a finding in its favor, were denied (R. 213). Judgment on a verdict in petitioner's favor was entered on May 28, 1940 (R. 223-225). Notice of appeal was filed on August 26, 1940 (R. 227) and the record was filed in the court below on November 23, 1940, within the time allowed by order of the district court entered on September 30, 1940 (R. 227, 228).

On February 15, 1941, petitioner moved in the court below for dismissal of the appeal on the ground that the record did

not include a statement of the errors to be asserted, required by Rule 9 of that court. On February 28, 1941, a statement of errors to be asserted was filed by the respondent and, by leave of court, made a part of the record on appeal (R. 233); the motion to dismiss was then denied (R. 247, 249-250). The court below further held that the evidence on the issue of fraud required, as a matter of law, a finding in favor of the respondent and, accordingly, that the district court erred in denying respondent's motion for a directed verdict. The judgment was reversed and the case remanded for further proceedings in harmony with the holding of the court below (R. 249-256).

ARGUMENT

1. Petitioner urges (Pet. 13) that the court below was in error in holding that the trial court should have granted the respondent's motion for a directed verdict.¹

An applicant for insurance has an absolute duty to disclose in good faith, fully, and fairly matters which he knows concerning his health. *Stipcich v. Metropolitan Life Insurance Co.*, 277 U. S. 311; *United States v. Elliott*, 73 F. (2d) 374 (C. C. A. 5), certiorari denied, 295 U. S. 740. Violation of this duty occurs when, in applying for a policy, the insured (a) makes untrue statements (b) material to the risk (c) with knowledge that they are untrue, or (d) without reasonable regard as to their truth or falsity. When such untrue statements are relied upon by the insurer, recovery on the policy is barred without further proof of actual conscious design to defraud. *Metropolitan Life Ins. Co. v. Hilton-Green*, 241 U. S. 613, 622; *Claflin v. Commonwealth Ins. Co.*, 110 U. S. 81, 85, 85; *Aetna Life Ins. Co. v. Perron*, 69 F. (2d) 401, 403 (C. A. A. 7); *United*

¹ Petitioner also contends (Pet. 13) that the action of the court below on the issue of fraud violated the Seventh Amendment to the Constitution and Rule 50 (b) of the Rules of Civil Procedure for the District Courts of the United States. The contention, however, is based upon the substantive proposition that there was sufficient evidence for the jury, and, in effect, raises only the question set out above.

States v. Depew, 100 F. (2d) 725, 728 (C. C. A. 10); *Nonantum Investment Co. v. Maryland Casualty Co.*, 56 F. (2d) 329, 335 (C. C. A. 1). Specific information requested by the insurer and related to the risk is material as a matter of law. *Perkins v. Prudential Life Ins. Co.*, 69 F. (2d) 218, 220 (C. C. A. 7); *Aetna Life Ins. Co. v. Bolding*, 57 F. (2d) 626 (C. C. A. 5); *Hesselberg v. Aetna Life Ins. Co.*, 75 F. (2d) 490, 493 (C. C. A. 8).

The policy sued on was issued pursuant to the insured's application, dated June 21, 1927, for reinstatement of his yearly renewable term insurance which had lapsed for nonpayment of the premium due on February 1, 1920 (R. 169-174), and his contemporaneous application for conversion of the reinstated policy (R. 206-207). As a condition to the reinstatement of the insurance, the insured certified in his application for reinstatement as true to the best of his knowledge and belief (1) that he had not been ill or consulted a physician with regard to his health since the lapse of his term insurance (R. 169); (2) that he had never been treated for any condition of the heart or blood vessels, or stomach or intestines (R. 171); and (3) that since the lapse of his insurance he had not been prevented by reason of ill health from attending his usual occupation (R. 169).

The evidence establishes that these statements were untrue; that they were known by the insured to be untrue at the time he made them; that they were material to the risk; and that they were relied upon by the Government in issuing the policy.

The insured was treated for a severe attack of sinusitis and ethmoiditis from January 16 to 25, 1927. He insured, himself an eye, ear, nose, and throat specialist, expressly recognized the attack as a recurrence of a chronic condition (R. 109-110, 120, 204, 208-209, 214). Dr. Burke discussed the insured's condition with him and advised him regarding it in 1922 and 1923 (R. 125, 204). That this sinus condition was

both severe and chronic in character is shown by the testimony of Dr. French, who treated the insured in 1919 (R. 124); by a number of written statements of the insured signed by him between 1928 and 1933 (R. 184, 185, 187, 189, 200, 202, 204, 208, 209); and by evidence that the condition recurred periodically until the time of the insured's death (R. 78, 190).

On April 6, 1925, the insured sought and obtained a gastrointestinal examination which resulted in a diagnosis of suspected duodenal pathology (R. 196). Written statements of the insured reflect that abdominal distress was experienced by him as early as 1919; that it was regarded by him to be duodenal ulcer as early as 1920 (R. 19); and that the symptoms recurred periodically thereafter until his death (R. 186, 187, 191, 204).

As early as 1918, while still in the military service, the insured was treated for a condition then diagnosed as myocarditis. The symptoms continued thereafter until his death (R. 97, 202, 204, 208, 210-211). After his discharge from military service in 1919, the insured resumed his private practice of medicine, but abandoned it in 1925 to accept a salaried position in the United States Veterans' Bureau because the strain and exposure of private practice were found to aggravate his condition (R. 208-209; Cf. R. 126, 177, 189).

The insured died suddenly on September 21, 1934, as the result of coronary thrombosis (R. 78). There is a direct causal relationship between infectious matter in the blood stream such as that resulting from sinusitis and duodenal ulcer, and myocarditis followed by thrombosis² (R. 80-82, 128-129, 146).

Under the applicable statutes and regulations, the insured was not entitled to the policy sued on unless he was in good

² In 1933 the insured, having reference to his own condition, described degenerative myocarditis as "the most treacherous form of heart disease known, as long as compensation keeps up there are very fine manifest symptoms, and that when decompensation does occur it is usually complete and final" (R. 213). Substantially to the same effect, also, is the testimony of Dr. Thompson regarding the apparent absence of symptoms, except upon careful medical examination, of such a heart condition (R. 77).

health. In issuing the policy, the Veterans' Administration accepted as true, and therefore as proof of good health, the statements made by the insured regarding his health. Had the presence of any disability, actual or potential, been reflected upon the face of the application an investigation would have been made, and the policy would not have been issued had any disease or disability been found (R. 138, 139).

None of the evidence relied upon by petitioner tends to controvert that here summarized. Petitioner adduced testimony showing that the insured appeared to laymen to be in good health; that his wife and family were not aware that he had any disability or illness except colds; and that he had no actual disability preventing his employment as a medical officer in the Veterans' Bureau and his leading an apparently normal life otherwise (R. 20-27, 29, 34, 40-48, 50, 56-58, 182, 183).

Petitioner contends (Pet. 15-19) that this evidence, and evidence of conflicting statements of the insured regarding his health, and a number of reports of medical examinations claimed to reflect an absence of actual disability, warranted submission of the case to the jury. But the decisive issue at the trial was not whether the insured was disabled when he applied for the policy. Whether he was then disabled was only one of the factors pertinent to the question of whether he was an insurable risk, and the statute vests in the Administrator of Veterans' Affairs exclusive jurisdiction to determine whether an applicant for insurance is an insurable risk. Sec. 5, World War Veterans' Act (U. S. C., Title 38, sec. 426); *Meadows v. United States*, 281 U. S. 271. There was ample information which, if known to the Administrator before the policy was issued, would have sustained refusal to issue the policy on the ground that the insured was not an acceptable risk.³

³ Indeed, a number of the medical examination reports upon which petitioner relies to show an absence of actual disability contain diagnoses of heart disability, sinusitis, and duodenal ulcer, as follows: Myocardial degeneration beginning on October 10, 1928 (Pl. Ex. 10; R. 185). Chronic constipation and gastroptosis, on June 3, 1929 (Pl. Ex. 13; R. 186). Sinusitis, duodenal ulcer, and myocarditis on November 12, 1930 (Pl. Ex. 14; R. 188); on May 27, 1931 (Pl. Ex. 15; R. 189); and on February 27, 1933 (Pl. Ex. 18; R. 192).

Since there was no conflict in the evidence and, therefore, no issue for the jury on the decisive question of whether, in applying for the insurance, the insured knowingly denied illnesses and treatment material to the risk, the cases cited by petitioner (Pet. 9) are inapposite. In each of those cases, there was conflicting evidence on the issue of whether the insured could reasonably have known of his condition. *Bailey v. United States*, 92 F. (2d) 456 (C. C. A. 5); *United States v. Robins*, 117 F. (2d) 145 (C. C. A. 3); *Jones v. United States*, 112 F. (2d) 282 (C. C. A. 8). These cases turn upon the principle that an applicant for insurance is held only to a reasonable degree of honest recollection and interpretation in answering questions concerning the risk, a principle not denied in the present case. But "a normal man is not allowed to go too far in basing his good faith on assertions that he has forgotten what those in possession of their ordinary faculties would remember." *Guardian Life Ins. Co. of America v. Clum*, 106 F. (2d) 592, 594 (C. C. A. 3). In the present case, it cannot reasonably be regarded that the insured had forgotten the illnesses and treatment which he denied.*

2. Petitioner also asserts that, for lack of timely compliance with the provisions of Rule 9 of the court below, that court was without jurisdiction to hear and determine the appeal on its merits (Pet. 13). Rule 9 provides that no appeal will be considered unless a statement of points setting out each error asserted and intended to be urged is filed with the clerk of the district court for inclusion in the record on appeal. The rule specifies no time within which such statement must be filed, but it seems plainly to have been intended that the filing of it would be subject to the limitations and requirements governing the filing of the record.

By order of the district court, the time for filing the record herein was extended to November 24, 1940 (R. 227-228). A record complying in all respects with the requirements of the

* None of the other cases claimed by petitioner to be in conflict with the decision herein involves the question of fraud.

Federal Rules of Civil Procedure, particularly Rule 75 (a), (b), and (d), was filed on November 23, 1940. The circuit court of appeals permitted the filing thereafter, on February 28, 1941, of a supplemental record containing a statement of points required by Rule 9, and designed solely to comply with the provisions of that rule.*

Rule 9 does not purport to be jurisdictional, and the court has ruled in this case, in effect, that it was not intended to be. The rule was issued subsequent to the effective date of the Rules of Civil Procedure, and, doubtless, was intended to harmonize with them. Yet if Rule 9 were interpreted as urged by petitioner, it would seem to be in conflict with Rule 73 (a) of the Rules of Civil Procedure, since the latter rule provides that failure to take any action after filing of notice of appeal will not invalidate the appeal. Even if no portion of the record had been timely filed, the circuit court of appeals, in its discretion, might have permitted the filing of it out of time. Rule 73 (a) of the Rules of Civil Procedure; *Ainsworth v. Gill Glass and Fixture Co.*, 104 F. (2d) 83, 85 (C. C. A. 3); *Miller v. United States*, 117 F. (2d) 256 (C. C. A. 7); *Johnson v. Wilson*, 118 F. (2d) 557, 558 (C. C. A. 9).

It would seem to follow that the court might also permit the filing of part of the record out of time. But, in any event, Rule 75 (h) of the Rules of Civil Procedure expressly authorizes the supplementing of a record on appeal, as was permitted by the circuit court of appeals in the present case.

* At the time the supplemental record was filed, neither party had filed a brief, and the case did not come on for oral argument until April 18, 1941. The Federal Rules of Civil Procedure do not require a statement of points where, as here, the complete record and all proceedings in the district court are included in the record on appeal. (Rule 75 (d)). These rules are apparently predicated upon the view that, if the entire record is before the Court of Appeals, fairness to the appellee does not require notice to him of points to be urged by appellant prior to service of the appellant's brief. In any event, the lack of prejudice to petitioner by reason of respondent's delayed compliance with Rule 9 in the present case is plain. She claims no prejudice.

CONCLUSION

The decision of the Circuit Court of Appeals is correct. It presents no question of large public importance and turns upon its own facts. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Acting Solicitor General.

JULIUS C. MARTIN,
*Director, Bureau of War
Risk Litigation.*

FENDALL MARBURY,
KEITH L. SEEGBILLER,
Attorneys.

OCTOBER 1941.

No. 665

In the Supreme Court of the United States

OCTOBER TERM, 1941

HARRIET V. PENCE, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below.....	1
Jurisdiction.....	1
Questions presented.....	2
Pertinent rules and regulations.....	2
Statement.....	5
Summary of argument.....	8
Argument:	
I. The Circuit Court of Appeals properly held that a verdict should have been directed for the Government.....	9
A. The representation that the insured had not consulted a physician in regard to his health between March 1920 and June 1927 was fraudulent.....	15
B. The representations that the insured had not been ill since March 1920 and that he had never been treated for any disease of the heart were fraudulent.....	22
C. The representation that the insured had not been prevented by ill health from attending his usual occupation was fraudulent.....	23
II. The portions of the record upon which petitioner relies do not create a conflict of evidence justifying submission of the issue of fraud to the jury.....	25
III. The Circuit Court of Appeals properly denied petitioner's contention that it lacked jurisdiction to hear the appeal.....	31
Conclusion.....	34

CITATIONS

Cases:	
<i>Adams v. New York C. & St. L. R. Co.</i> , 121 F. (2d) 808.....	32
<i>Aetna Life Ins. Co. v. Bolding</i> , 57 F. (2d) 626.....	31
<i>Aetna Life Ins. Co. v. Perron</i> , 69 F. (2d) 401.....	31
<i>Ainsworth v. Gill Glass and Fixture Co.</i> , 104 F. (2d) 83.....	33
<i>Armstrong v. United States</i> , 16 F. (2d) 387.....	26
<i>Bella S. S. Co. v. Insurance Co. of North America</i> , 5 F. (2d) 570.....	19, 31
<i>Clafin v. Commonwealth Ins. Co.</i> , 110 U. S. 81.....	9, 21
<i>Columbian National Life Ins. Co. v. Rodgers</i> , 93 F. (2d) 740.....	31

Cases—Continued.

	Page
<i>Consolidated Edison Company v. National Labor Relations Board</i> , 305 U. S. 197.....	10
<i>Cooper v. Schlessinger</i> , 111 U. S. 148.....	9
<i>Derry v. Peek</i> , 14 App. Cas. 337 (House of Lords).....	9
<i>Gunning v. Cooley</i> , 281 U. S. 90.....	10
<i>Hindman v. First National Bank</i> , 112 Fed. 931.....	9
<i>Johnson v. Wilson</i> , 118 F. (2d) 557.....	33
<i>Kerr v. Union Marine Insurance Co.</i> , 130 Fed. 415.....	19
<i>Lehigh Zinc and Iron Co. v. Bamford</i> , 150 U. S. 665.....	9
<i>Maddox v. United States</i> , 16 F. (2d) 390.....	26
<i>Meadows v. United States</i> , 281 U. S. 271.....	26
<i>Metropolitan Life Insurance Co. v. Madden</i> , 117 F. (2d) 446.....	19
<i>Miller v. United States</i> , 117 F. (2d) 256.....	33
<i>Mutual Life Insurance Co. v. Hilton-Green</i> , 241 U. S. 613.....	9, 21
<i>New York Life Ins. Co. v. Fletcher</i> , 117 U. S. 519.....	9
<i>Penna. R. Co. v. Chamberlain</i> , 288 U. S. 333.....	10
<i>Slocum v. New York Life Ins. Co.</i> , 228 U. S. 364.....	10
<i>Southern Development Co. v. Silva</i> , 125 U. S. 247.....	9
<i>Stipcich v. Metropolitan Life Insurance Co.</i> , 277 U. S. 311.....	21
<i>United States v. Depew</i> , 100 F. (2d) 725.....	9
Statute:	
Sec. 307, World War Veterans' Act (38 U. S. C. 518).....	6
Miscellaneous:	
Rule 9 of the Circuit Court of Appeals for the Seventh Circuit.....	2, 31
Rule 15 (b) of the Rules of Civil Procedure.....	15
Rule 73 (a) of the Rules of Civil Procedure.....	3, 32
Rule 73 (g) of the Rules of Civil Procedure.....	3
Rule 50 (b) of the Rules of Civil Procedure.....	2
Rule 75 (d) of the Rules of Civil Procedure.....	4, 32
Rule 75 (h) of the Rules of Civil Procedure.....	4, 33
Veterans' Bureau Regulation No. 14.....	5

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 665

HARRIET V. PENCE, PETITIONER

v.

THE UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court on motions after verdict (R. 219-222), and its supplemental opinion (R. 223), are not reported. The majority and dissenting opinions in the Circuit Court of Appeals (R. 246-253) are reported in 121 F. 2d 804.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 2, 1941 (R. 254), and a petition for rehearing was denied on August 4, 1941 (R. 254). The petition for a writ of certiorari was filed on September 29, 1941, and was granted

on November 10, 1941 (R. 256). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, as a matter of law, the evidence requires a finding that the policy sued on was obtained by fraud.¹

2. Whether the Circuit Court of Appeals had jurisdiction to hear and determine the appeal on its merits despite the omission from the original record on appeal of a statement of points, required by a rule of the Circuit Court of Appeals, when the required statement was later embodied in the record by permission of that court.

PERTINENT RULES AND REGULATIONS

Rule 9 of the Circuit Court of Appeals for the Seventh Circuit provides in part as follows:

1. Where an appeal is taken to this court, the appellant shall file with the clerk of the district court, for inclusion in the record on appeal, a statement of points which shall

¹ Petitioner contends (Pet. 21-24, Br. 8-10) that the holding of the Circuit Court of Appeals, that fraud was established as a matter of law, leaving no question of fact for submission to the jury, contravenes the Seventh Amendment to the Constitution and Rule 50 (b) of the Federal Rules of Civil Procedure. The contention, however, is based upon the substantive proposition that fraud was not established as a matter of law and in effect raises only the question set out above.

set out separately and particularly each error asserted and intended to be urged. No appeal shall be considered unless such a statement of points shall have been so filed.

Rule 73 of the Rules of Civil Procedure for the District Courts provides:

RULE 73. APPEAL TO A CIRCUIT COURT OF APPEALS.

(a) **HOW TAKEN.**—When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

• • • • •
(g) **DOCKETING AND RECORD ON APPEAL.**—

The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the action there docketed within 40 days from the date of the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days

from the date of the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the action, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal.

Rule 75 of the Rules of Civil Procedure for the District Courts provides:

RULE 75. RECORD ON APPEAL TO A CIRCUIT COURT OF APPEALS.

* * * *

(d) **STATEMENT OF POINTS.**—If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal.

* * * *

(h) **POWER OF COURT TO CORRECT RECORD.**—It is not necessary for the record on appeal to be approved by the district court or judge thereof, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party

is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court.

Veterans' Bureau Regulation No. 14 (Regulations and Procedure, p. 83) provides:

9. Application and proof of insurability.—The applicant for reinstatement or ~~reinstatement and conversion must furnish~~ during his lifetime a written application signed by him, which shall state that he is in as good health as at date of lapse, or that he is in good health, and that he is not permanently and totally disabled in accordance with the requirements of the particular case, and in addition the applicant shall furnish such evidence relative to his physical condition as may be required by the director, and on such forms as the director may prescribe: * * *

STATEMENT

The petitioner, widow and beneficiary of the insured (R. 2, 3), brought suit on a contract of United States Government life (converted) insurance issued to Lawrence W. Pence on July 1, 1927 (R. 1-5).

The insured, an eye, ear, nose and throat specialist (R. 177, 212), was a medical officer in the military service of the United States from August 7, 1918, to January 9, 1919; during that period he obtained a \$10,000 contract of yearly renewable term insurance which on March 2, 1920, lapsed for nonpayment of the premium due February 1, 1920 (R. 2, 14, 197). The policy now sued on is the renewal (R. 174-175) of a policy issued upon applications, executed on June 21, 1927, for reinstatement and simultaneous conversion of the lapsed term policy (R. 169-174, 206-207).² Premiums on this reinstated and converted insurance were tendered and accepted from the date of its issuance in 1927 through the month of August 1934. The insured died on September 21, 1934, during the grace period of 31 days allowed for payment of the premium for September 1934 (R. 14-15).

The only issue presented in the District Court was raised by the Government's affirmative defense that the policy was obtained by fraudulent representations on the part of the insured in his application for reinstatement (R. 10).³

² The reinstatement was obtained under Regulation No. 14, *supra*, p. 5, requiring, *inter alia*, that the applicant submit "such evidence relative to his physical condition as may be required by the director, and on such forms as the director may prescribe * * *."

³ The policy sued on was contestable at any time on the ground of fraud. See Section 307, World War Veterans' Act (38 U. S. C. 518), which makes the policy incontestable from the date of its issuance except for specific grounds, including fraud.

The Government's motion for a directed verdict, made after all the evidence had been introduced (R. 157), and its motion for judgment, made after the verdict was returned, upon the ground that the evidence required a finding in its favor (R. 215-217), were denied (R. 223).

Judgment on a verdict in petitioner's favor (R. 218) was entered on May 28, 1940 (R. 225-226). Notice of appeal was filed by the Government on August 26, 1940 (R. 227), and the record was filed in the Circuit Court of Appeals on November 23, 1940,* within the time allowed by an order of the District Court entered on September 30, 1940 (R. 227-228).

On February 15, 1941, petitioner moved in the Circuit Court of Appeals to dismiss the appeal or to affirm the judgment on the ground, *inter alia*, that the record did not include a statement of points, as required by Rule 9 of that court (R. 239-240). Pursuant to leave granted by the Circuit Court of Appeals on February 26, 1941 (R. 245, 247), the statement of points was filed in the District Court on February 28, 1941 (R. 233-234), and in the Circuit Court of Appeals on March 3, 1941 (R. 245). The Circuit Court of Appeals held petitioner's motion to be without merit and denied it (R. 245, 247).

The Circuit Court of Appeals further held, one judge dissenting, that the evidence on the issue of

* The date of filing appears from the cover of the transcript of record in the Circuit Court of Appeals.

fraud required a finding in favor of the Government as a matter of law and, accordingly, that the District Court erred in denying the Government's motion for a directed verdict (R. 246-253). The judgment was reversed and the case remanded to the District Court for further proceedings in harmony with the holding of the Circuit Court of Appeals (R. 253, 254).

SUMMARY OF ARGUMENT

1. The evidence, recited in detail in the Argument, establishes beyond contradiction that one or more of the material representations made by the insured in his application for reinstatement was false, that each of the representations was made by the insured with knowledge of its falsity and with intent to deceive, and that the Government relied upon each of them in reinstating the policy. Since all of the elements of fraud were thus established by uncontradicted evidence, the Circuit Court of Appeals properly held that a verdict should have been directed for the Government. The portions of the record upon which petitioner relies do not create a conflict of evidence justifying submission of the issue of fraud to the jury.

2. The Circuit Court of Appeals properly denied petitioner's contention that it lacked jurisdiction to hear the appeal because a statement of points had not been included in the original record transmitted to it, as required by Rule 9 of

the Rules of that court. The requirements of Rule 9, as the court below held, are not jurisdictional in nature.

ARGUMENT

I

THE CIRCUIT COURT OF APPEALS PROPERLY HELD THAT A VERDICT SHOULD HAVE BEEN DIRECTED FOR THE GOVERNMENT

The court below held that the evidence in this case establishes beyond contradiction that the insured had made misrepresentations in his application, signed by him on June 21, 1927 (R. 169-172), for reinstatement of his insurance which had lapsed on March 2, 1920 (R. 14), that these misrepresentations were fraudulent,³ and accordingly that the District Court should have

³ The elements of the defense of fraud in such a case as the present one are disclosed in numerous decisions to be these: (1) A false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive and be acted upon (5) when action has been taken in reliance upon the representation. *Mutual Life Insurance Co. v. Hilton-Green*, 241 U. S. 613, 620, 622; *Clafin v. Commonwealth Ins. Co.*, 110 U. S. 81, 95; *New York Life Ins. Co. v. Fletcher*, 117 U. S. 519, 533; *Cooper v. Schlesinger*, 111 U. S. 148 (finding no error, p. 155, in the instructions of the District Court to the jury, pp. 152-153); *Lehigh Zinc and Iron Co. v. Bamford*, 150 U. S. 665, 673; *United States v. Depew*, 100 F. (2d) 725 (C. C. A. 10); *Hindman v. First National Bank*, 112 Fed. 931, 944-945 (C. C. A. 6). Cf. *Southern Development Co. v. Silva*, 125 U. S. 247, 250; *Derry v. Peek*, 14 App. Cas. 337, 374 (House of Lords).

directed a verdict in favor of the Government.^{*}
This decision we believe to be plainly correct.

The fraudulent representations were contained in the answers given to the following questions in the application for reinstatement:

7. Have you been ill, or contracted any disease, or suffered any injury, or been prevented by reason of ill health from attending your usual occupation, or consulted a physician in regard to your health, since lapse of this insurance? (Answer "Yes" or "No".) *No*. If so, give dates and full particulars, including the name and address of physician-----

11. Have you ever been treated for any disease of brain or nerves *No*, throat or lungs *No*, heart or blood vessels *No*, stomach,

^{*}The rule is well settled that "When, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party." *Slocum v. New York Life Insurance Co.*, 228 U. S. 364, 369, quoted in *Gunning v. Cooley*, 281 U. S. 90, 93, with numerous supporting decisions of this Court. "A mere scintilla of evidence is not enough to require the submission of an issue to the jury." *Gunning v. Cooley*, p. 94; *Penna. R. Co. v. Chamberlain*, 288 U. S. 333, 339; cf. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229.

liver, intestines *No*, kidney or bladder *No*,
genito urinary organs *No*, skin *No*, glands
No, ear or eye *No*, bones *No*. (Answer each
"Yes" or "No". If "Yes" describe fully
and give dates.) -----

(R. 169, 171-172; answers put in italics).⁷

The evidence establishes that the negative answer given to question 7 was untrue in three respects: first, because the insured had consulted a physician in regard to his health since the lapse of the insurance; second, because he had been ill between the date of the lapse of the policy and the date of the reinstatement application; and, third, because he had been prevented from attending his usual occupation by reason of ill health during the policy's lapse. The evidence also establishes that the answer given to question 11 that the insured had never been treated for any disease of the heart was untrue. And,

⁷ The seventh question of the application was in that portion which was filled out by the applicant. It was preceded by the recitation: "As a condition to the reinstatement of this insurance, I do hereby certify that the answers to the following questions are true to the best of my knowledge and belief * * *" (R. 169).

The eleventh question was in that portion of the application entitled "Medical Examination. * * * Applicant's Own Statement." This portion was undoubtedly filled out by the medical examiner pursuant to questions propounded to the applicant; but was signed by the applicant in the presence of the medical examiner (R. 171-172).

finally, the evidence shows that each of these misrepresentations was known by the insured to be untrue at the time he made it, that each of them was material to the risk, that each of them was made with the intention to deceive, and that each of them was relied upon by the Government in issuing the policy.

We discuss each of these misrepresentations separately below. We believe that, with respect to each of them, a directed verdict on the issue of fraud was required. But we are, of course, required to establish only that the evidence shows without contradiction that one of the answers was fraudulently made, for fraud shown by uncontradicted evidence with respect to any one answer required a directed verdict for the Government.

It is scarcely disputed that the insured sought to defraud the Government, either in his application for reinstatement of the insurance or in his subsequent applications for retirement, disability compensation, vocational training, and pension (hereinafter collectively referred to as "applications for benefits"). In his application for reinstatement signed on June 21, 1927, the insured pictured himself as a well man who had never been treated for any serious disease and who had not been ill or even consulted a physician since 1920, when his insurance had lapsed—in other words, as a first-class insurance risk. Yet, on August 27, 1928, within 15 months after the appli-

cation for reinstatement, he put in a claim for disability compensation. At that time, when it was to his interest to picture himself as a badly disabled veteran, he asserted that he had been afflicted since 1918 with sinusitis, ethmoiditis, and myocarditis (R. 197). He made substantially the same representations on May 24, 1929, when he filed a claim for Emergency Officers Retirement benefits (R. 199-200). Again, in December 1933, when he claimed a soldier's pension, he asserted that he had been afflicted since 1918 with sinusitis and myocarditis, and, further, that he was suffering from a duodenal ulcer, resulting from a gastro-intestinal upset during his period of military service (R. 202-206).^{*} In the 1933 pension claim, too, he listed several doctors whom he had consulted between 1920 and 1927, this representation, of course, being in direct contravention of his representation in his 1927 application for reinstatement that he had never consulted a physician in regard to his health during that period.

Petitioner does not deny the conflict between the insured's representations in his application for reinstatement of insurance and his representations in his applications for benefits, but urges that it was for the jury to decide which assertions were true. We believe, however, that, certainly with respect to one representation in

^{*} See also the insured's claim for disability allowance filed July 14, 1930 (R. 200-201).

the application for reinstatement, and probably with respect to all of the representations upon which we rely, there is no evidence in the record conflicting with the Government's proof that the insured answered falsely and fraudulently. And, as we have stated, if any single one of the representations is shown by the uncontradicted evidence to have been fraudulent, the Government was entitled to a directed verdict, even though a conflict of evidence may be thought to exist with respect to the fraudulent nature of the other representations.

We discuss first, then, the representation concerning the fraudulent nature of which we think no possible conflict of evidence can be said to exist—namely, that the insured had not consulted a physician with regard to his health between March 1920 and June 1927. We show that the undisputed evidence establishes that this representation was false, that it was made with reference to a material fact, that it was made with knowledge of its falsity, that it was made with intention to deceive and be acted upon, and that the policy was issued in reliance upon its truth. Following that discussion, we consider the evidence concerning the representations that the insured had not been ill between March 1920 and June 1927, that he had never been treated for any disease of the heart, and that he had not been

prevented by reason of ill health from attending his usual occupation.*

A. THE REPRESENTATION THAT THE INSURED HAD NOT CONSULTED A PHYSICIAN IN REGARD TO HIS HEALTH BETWEEN MARCH 1920 AND JUNE 1927 WAS FRAUDULENT

Falsity.—The falsity of this representation was affirmatively established by the testimony of Dr. Glickman that he was consulted by the insured and that he had treated the insured from January 16 to January 25, 1927, for sinusitis and ethmoiditis (R. 109).

An affidavit executed by Dr. Glickman on September 7, 1928 (R. 119-120, 214) likewise refers to this consultation, while an affidavit executed by the insured on the same date (R. 208-209) recites that he was treated by a physician in January 1927 for eight days for sinusitis, and that during this period he was confined to bed.¹⁰

* The Government's answer to the complaint (R. 10) alleges fraud only with respect to the insured's answers to question 11. However, the record shows that the case was actually tried as though the pleadings raised an issue of fraud with respect to each of the representations upon which the Government relies. Since no objection was made by petitioner, these issues actually tried are to be treated as though they had been raised in the pleadings. Rule 15 (b) of the Rules of Civil Procedure for the District Courts.

¹⁰ The affidavits executed on September 7, 1928, by Dr. Glickman and the insured were submitted by the latter as supplementary to a compensation claim executed by him on August 27, 1928, and witnessed by Dr. Glickman (R. 197-

There is no conflicting evidence with respect to the fact of this consultation. While petitioner and others closely associated with the insured testified that they were not aware that the insured had ever been treated by a physician (R. 18-19, 41, 58), this testimony is obviously negative in character and does not contradict the direct testimony of Dr. Glickman or the evidence furnished by the insured's own statement.

The falsity of the representation is further shown by undisputed evidence that the insured sought and obtained a gastro-intestinal examination by physicians at the Veterans Hospital at Sioux Falls, South Dakota, on April 6, 1925. The insured made several statements, subsequent to the reinstatement of his insurance and in support of claims for disability benefits other than insurance, that this examination had been made at his request (R. 185, 187, 211). Petitioner herself testified that a gastro-intestinal examination of the insured had been made at the Sioux Falls Hospital (R. 37-38). Excerpts from the report of this examination are contained in the record and reveal that the findings resulted in a diagnosis of "Suspected duodenal pathology" (R. 196).

199). Hence, the failure of the insured to refer to the treatment by Dr. Glickman, in response to a question in the form of the compensation claim itself, designed to elicit it (R. 198), was plainly an error corrected by the affidavits submitted with the claim.

Knowledge of falsity.—There can be no doubt that the insured knew of the falsity of his representation that he had not consulted a physician between March 1920 and June 1927.

Knowledge of falsity in the omission of any reference to consultation with respect to sinusitis is established by the fact that, on September 27, 1928, the insured filed an affidavit in connection with a claim for disability compensation in which he set forth this specific consultation with Dr. Glickman. It should be noted, too, that this consultation occurred just five months prior to the execution of the reinstatement application and was for the purpose of securing treatment for an acute, painful exacerbation of a condition which had existed for at least eight years.

Dr. Glickman's testimony and affidavit of September 7, 1928, shows that when he treated the insured in January 1927 for sinusitis and ethmoiditis he made an examination which disclosed a bloody discharge from the nose and severe pain between the eyes (R. 109), necessitating treatment by "Argyrol installations and packs" and "serum therapy" (R. 120). He stated, moreover, that the condition for which he treated the insured was incurable (R. 120), and that the insured—who was an eye, ear, nose and throat specialist (R. 110, 177)—had himself expressly recognized it as "a recurrence of a chronic condition" (R. 110). Other evidence showed that the condition had

existed in a severe form since 1919. See testimony of Dr. French (R. 123-124) and Dr. Burke (R. 125-126).

Subsequent to the reinstatement, the insured recalled the facts of medical consultation and treatment for sinusitis prior to June 1927 (R. 208-209; see also R. 204).

Knowledge of falsity in the omission from the application of any reference to the consultation in 1925 for gastro-intestinal disorder is established by the fact that the insured, subsequent to the reinstatement, recalled the consultation and relied upon the resultant findings and diagnosis in support of claims asserted by him for benefits other than insurance. Moreover, the condition disclosed as a result of the consultation was obviously too serious to have been forgotten by the insured, especially since there is testimony that the insured suspected the possibility, prior to the consultation, of an even more serious condition than was disclosed.

On November 28, 1931, the insured made reference, in a written statement supplementing his claim for Emergency Officers Retirement benefits; to a severe gastric upset experienced by him during his military service, and stated that it turned out to be the forerunner of duodenal ulcer, which perforated in 1920 and again in 1925, and that because of constant distress and tarry stools, "I requested a GI. [gastro-intestinal] X-ray

* * *. The diagnosis at that time was duodenal ulcer active." (R. 211; see also R. 185, 187, 204.)

Petitioner testified that the motive of the insured in the consultation with physicians in April 1925, when the gastro-intestinal examination was made, was to "have a check-up" because of a family history of cancer (R. 38).

Materiality.—In the absence of any evidence to the contrary, the representation of the insured that he had not consulted a physician regarding his health will be presumed to be material simply by reason of the fact that the insurer made specific inquiry with respect to that subject. *Bella S. S. Co. v. Insurance Co. of North America*, 5 F. (2d) 570, 572 (C. C. A. 4); *Kerr v. Union Marine Insurance Co.*, 130 Fed. 415, 417 (C. C. A. 6); *Metropolitan Life Insurance Co. v. Madden*, 117 F. (2d) 446, 451 (C. C. A. 5).

It is also manifest that the representation was material *per se*. Mere mention of the consultation with Dr. Gluckman would have opened the gate to an extensive history of chronic sinusitis and ethmoiditis. Likewise, disclosure of the gastro-intestinal examination would have led to the revelation of a history of abdominal disorder. It is thus apparent, we believe, that a truthful answer in this single particular would have made available to the insurer abundant information pertinent to a determination of whether the risk of issuing insurance

against total permanent disability and death should be assumed."

It is true that the Circuit Court of Appeals suggests in its opinion that, so far as the falsity of insured's representation was established by the consultation relative to sinusitis, such consultation "might appear immaterial in view of the fact that there was no reference to a disease of the nose or sinuses in the eleventh question." ¹¹ (R. 251.) But the representation that the insured had not consulted a physician was contained in his answer to question 7, not in his answer to question 11. The possible view of the court that the scope of question 7 should be regarded as limited to the conditions mentioned in question 11 is not, we believe, tenable. The seventh question was obviously designed to elicit information regarding relatively recent illness of any character (during the period since the lapse of the insurance) deemed pertinent because of its proximity in time to the possible assumption

¹¹ The insured died suddenly. Upon the evening of September 20, 1934, he stated that he did not feel well and retired about 8 o'clock. He was found dead the next morning, September 21, 1934. The cause of death shown on the death certificate was "coronary thrombosis, sudden death, myocarditis chronic, chronic sinusitis, nasal accessory sinusitis, with acute exacerbation" (R. 78). The undisputed testimony establishes that the insured's heart condition was induced and aggravated by infection from his sinusitis and duodenal ulcer (R. 81-82, 128-129, 145-146).

¹² The eleventh question sought information as to whether the applicant had ever been treated for a limited number of enumerated conditions (R. 171-172).

of risk under consideration; question 11 was plainly intended to secure information regarding conditions deemed to be pertinent, regardless of their remoteness in time. The latter conditions were obviously specified to avoid any possibility that the applicant might forget them.

Intention to deceive.—The insured's intention to deceive is presumed, as a matter of law, from the fact that he made the representation with knowledge of its falsity. *Mutual Life Insurance Co. v. Hilton-Green*, 241 U. S. 613, 622; *Claslin v. Commonwealth Ins. Co.*, 110 U. S. 81, 95. See also *Stipcich v. Metropolitan Life Ins. Co.*, 277 U. S. 311, 316-317, pointing out that "even the most unsophisticated person must know that in answering the questionnaire and submitting it to the insurer he is furnishing the data on the basis of which the company will decide whether, by issuing a policy, it wishes to insure him." Moreover, the evidence previously recited makes it manifest that there was on the insured's part a conscious design to deceive, and there is no evidence to warrant any other inference.

Reliance.—The insurance policy was, in fact, reinstated in reliance upon the insured's representations. This is established by the undisputed testimony of an official of the Veterans' Administration serving as a technical advisor on insurance (R. 139). Moreover, he testified that if the application had revealed that a physician had been con-

sulted, an investigation would have been made to determine what condition was found upon such consultation (R. 137).

B. THE REPRESENTATIONS THAT THE INSURED HAD NOT BEEN ILL SINCE MARCH 1920 AND THAT HE HAD NEVER BEEN TREATED FOR ANY DISEASE OF THE HEART WERE FRAUDULENT

The undisputed evidence establishes that the insured had in fact been ill by reason of sinusitis and ethmoiditis in January 1927, within six months prior to the reinstatement of the insurance. This evidence has been discussed (*supra*, pp. 15, 17).

Likewise, there has been set out in detail (*supra*, pp. 16, 18-19), the uncontradicted evidence disclosing findings and symptoms indicative of the existence of duodenal ulcer for a substantial period of time prior to the reinstatement of the insurance, and the conclusion of the insured, who was a physician, that he had had active duodenal ulcer as early as 1920.

Subsequent to reinstatement, the insured executed sworn statements on August 7, 1928, and September 7, 1928, that he was afflicted with myocarditis which had originated in 1918, as the result of influenza; that during the years following his discharge from the service (1919), he experienced constant "air hunger," which was still noticeable in 1928, and which was regarded by him as due to myocarditis (R. 197, 208; see also R. 189, 200, 202). Also, in a letter dated November 28, 1931,

the insured stated, with reference to the diagnosis of myocarditis during service (R. 210-211):

The incidents preceding and leading to the diagnosis of acute myocarditis are these: one night when Major DeWeise came in he found me sitting on the side of the bed. On being told that I was doing it because of difficulty in getting my breath and that I thot [sic.] it was due to soft coal gas, he examined my chest with stethoscope and said: Man, your heart is "shot." He got me some medicine which relieved the symptoms and which [I] continued to take as per his directions for several weeks. He told me I had acute myocarditis and that it would be necessary to take things rather quietly for some time.

In concluding his letter, the insured stated, apparently with reference to the attack in 1918 (R. 211):

I never had a day of sickness in my life before this and I do not believe I have had an entirely well one since.

C. THE REPRESENTATION THAT THE INSURED HAD NOT BEEN PREVENTED BY ILL HEALTH FROM ATTENDING HIS USUAL OCCUPATION WAS FRAUDULENT

The evidence established that in 1925 the insured abandoned a private practice as a physician of over twenty years (R. 177, 200), with an income of more than \$7,000 a year, to accept employment with the Government at a salary of \$3,800 per year (R. 189). His employment in the Government service thereafter until the date of his death was

that of a physician at various veterans' hospitals and homes (R. 19-20, 27, 40-41, 63).

There was undisputed evidence that he abandoned his private practice by reason of ill health. Dr. Burke, an acquaintance, testified that insured had talked with him in 1922 and 1923 regarding his sinusitis (R. 125), and had stated an intention to give up his private practice because "it was too hard, and he had too many headaches," and "he had considerable trouble with his sinuses" (R. 126). And on September 7, 1928, the insured signed a statement which recited that "Since discharge the sinusitis has become more severe with constant frontal headaches making it necessary for me to give up my practice and find employment where I could be inside. Cannot stand any exposure to cold" (R. 208). Also, on October 10, 1928, the insured, in relating his industrial history, stated that while in private practice he had lost about half time from work on account of sinus trouble (R. 209).

It may be argued, of course, that this evidence shows merely a change of activity within the field of the single occupation of medicine, and that question 7 should be construed literally as referring to the effect of ill health upon the ability to pursue the occupation itself, rather than upon the ability to continue in the character of activity usually engaged in. This technical interpretation of question 7 would, however, be repugnant to the clear pur-

pose of the insurer in asking it, and it strains credulity to believe that a person of the education, training, and employment background of the insured could have thought that such a legalistic interpretation was warranted. We believe, therefore, that the insured's negative answer to this portion of question 7, coupled with nondisclosure elsewhere in the application of the pertinent information, constituted a breach of his obligation to exercise good faith.

The evidence discussed makes completely clear, we think, that the insured, who was a physician employed by the Veterans' Administration in his professional capacity, knew that there existed most substantial reasons why his application for the reinstatement of insurance should either not be granted at all, or, at the very least, why it should not be granted until after most careful consideration of numerous factors affecting the risk, and that the insured fraudulently failed to disclose those factors.

II

THE PORTIONS OF THE RECORD UPON WHICH PETITIONER RELIES DO NOT CREATE A CONFLICT OF EVIDENCE JUSTIFYING SUBMISSION OF THE ISSUE OF FRAUD TO THE JURY

1. In her brief in support of the petition for a writ of certiorari (Pet. 11-19), now adopted as part of her argument on the merits (Br. 3), petitioner urges primarily that there was evidence

tending to show that the insured was in good health when he applied for the reinstatement of his insurance in June 1927. We concede that there is some evidence to this effect, but we deny that it creates any conflict of evidence on the determinative issue of fraud.

The question whether the insured was a good insurance risk and entitled to reinstate his insurance was for the exclusive determination of the Administrator of Veterans' Affairs (*Meadows v. United States*, 281 U. S. 271, 275; see also *Armstrong v. United States*, 16 F. (2d) 387, 389 (C. C. A. 8); *Maddox v. United States*, 16 F. (2d) 390, 391 (C. C. A. 8)), and in the determination of that question the Administrator was entitled to a full and fair disclosure of the information sought by him and deemed by him to be material. The issue in litigation, therefore, was whether the insured made fraudulent representations. As we have shown, the undisputed evidence establishes that he did make such representations and that they had the effect of depriving the Administrator of information deemed by him to be essential to the proper performance of his duty of determining whether the insurance should issue. The Government's contentions are not rested, as petitioner apparently assumes, upon the narrow ground that the insured was not in good health when he applied for reinstatement. A person conclusively shown to be in good health at a particular time may nevertheless reasonably be re-

garded as a poor insurance risk by reason of past illnesses and increased susceptibility to future disease, disability, and early death.

Nor can the evidence upon which petitioner relies in respect of the false issue of good health at the time of the application be deemed to have created any real conflict for jury consideration with reference to the true issue of fraud. This evidence consisted broadly of the following:

Testimony of petitioner and other lay witnesses closely associated with the insured to the effect that they were unaware that he had been ill except for a condition described by them as "colds" two or three times each winter, that, so far as they knew, he had never been treated by a physician, and that he had led a relatively active and normal life (R. 20-27, 29, 34, 40-49, 50, 56-58); reports of medical examinations prior to reinstatement, including the report submitted with the application for reinstatement, in which no physical disorders were discovered (R. 172-173, 176, 182-183); a statement made by the insured on December 3, 1924, indicating good health then and prior thereto (R. 177-178); and reports of certain medical examinations, made subsequent to reinstatement, in which ailments claimed by the insured were either not found or were found to exist in a lesser degree than claimed (R. 185-186, 191-192, 196).¹¹

¹¹ Other reports subsequent to reinstatement disclosed or indicated the disorders of which complaint was made (R. 188, 190, 192, 193, 195).

The negative evidence that the petitioner and other persons associated with the insured were unaware of his ailments does not refute the positive evidence showing that he was in fact ill on occasions between the lapse of his insurance and the request for its reinstatement, and that he consulted physicians and received treatment for his disorders. The disabilities claimed by him were of a character not ordinarily recognizable by laymen. Thus, with reference to his heart condition, the insured himself stated (R. 213):

It should be well known that a degenerative type of myocarditis is the most treacherous form of heart disease known, as long as compensation keeps up there are very fine manifest symptoms and that when decompensation does occur it is usually complete and final.

And Dr. Thompson, head of the hospital at which the insured last worked, testified, in effect, that sinusitis and myocarditis would not ordinarily be detectable except upon careful medical examination (R. 77). Moreover, it is apparent that petitioner was unaware of the findings made upon the gastro-intestinal examination of insured in 1925, or unable to recognize their significance (R. 31, 38), and that she could not distinguish between sinusitis and the common cold (R. 32-34). However, the insured himself readily made the appropriate distinction in requesting Government sick leave (R. 76-77).

That medical examinations on widely separated occasions revealed no illness is evidence that there was an absence of illness at the time of each such examination but does not show that illness did not exist at other times. It has, of course, no probative value with respect to the question as to whether the insured consulted physicians upon other occasions with respect to his health, or was treated by them for physical ailments.

Thus, the findings of Dr. French in 1924 (R. 182) and Dr. Pearce in 1925 (R. 183-184) that the insured was not then ill, cannot be regarded as in conflict with Dr. Glickman's testimony that by reason of illness existing in 1927, the insured consulted him and received treatment, or the testimony of Dr. Burke that the insured, in 1922 and 1923, complained that he was afflicted with sinusitis, and that he intended, because of his illness, to abandon the private practice of medicine. Neither can the findings of Dr. French and Dr. Pearce be deemed inconsistent with the evidence showing that the insured was treated for a heart condition in 1918.

2. Petitioner attacks (Br. 3-4) the statement of the Circuit Court of Appeals that "Certainly it appears to us that the Government is entitled to rely upon statements furnished by Pence for a different purpose, to prove the falsity of the information furnished for the purpose of reinstating the policy." She states that "By 'rely upon state-

ments' the Court of Appeals really means that these statements proved the falsity of the statements in the application for reinstatement" and contends, in effect, that the insured merely made inconsistent statements, which presented a question for the jury whether the representations made in the application for reinstatement or the representations made in the applications for benefits were false.

It thus appears that petitioner regards the insured's representations in his application for reinstatement as evidence of their own truthfulness, with the result that the Government's evidence that the representations were fraudulent, although otherwise undisputed in essential particulars, merely creates a conflict of evidence requiring jury consideration. Petitioner's error in this respect lies in her failure to realize that the insured's representations in his application for reinstatement are not evidence of their own truth or falsity. Upon the issue whether these representations were fraudulent, the representations themselves obviously have no probative value whatever; they are evidence merely for the purpose of showing what they are and, thus, the nature of the issue created by the Government's allegation that they were fraudulent. If the law were otherwise, it would follow that a verdict could never be directed in favor of a party alleging fraud in any case in which the falsity of a representation was in issue.

Yet, verdicts have frequently been directed in such circumstances. Cf. *Bella S. S. Co. v. Insurance Co. of North America*, 5 F. (2d) 570 (C. C. A. 4); *Aetna Life Ins. Co. v. Perron*, 69 F. (2d) 401 (C. C. A. 7); *Aetna Life Ins. Co. v. Bolding*, 57 F. (2d) 626 (C. C. A. 5); *Columbian National Life Ins. Co. v. Rodgers*, 93 F. (2d) 740 (C. C. A. 10).

III

THE CIRCUIT COURT OF APPEALS, PROPERLY DENIED PETITIONER'S CONTENTION THAT IT LACKED JURISDICTION TO HEAR THE APPEAL

Petitioner argues at some length in her brief in support of the petition for a writ of certiorari (Pet. 24-27) that because of lack of prompt compliance with the provisions of Rule 9 of the Circuit Court of Appeals, that court was without jurisdiction to hear and determine the appeal on its merits.¹⁴

Rule 9 (*supra*, pp. 2-3), provides that no appeal will be considered unless a statement of points setting out each error asserted and intended to be urged is filed with the Clerk of the District Court for inclusion in the record on appeal. The rule recites no specific time within which the statement must be filed, but presumably it was intended that it should accompany the record transmitted to the appellate court.

¹⁴ In her brief on the merits, petitioner states that "Although we do not abandon the point we prefer to rest our case on the merits * * * (Br. 11).

However, Rule 9 does not purport to be jurisdictional, and that it is not regarded as jurisdictional by the court which promulgated it is conclusively shown by the decision in this very case. The rule was adopted on November 10, 1939, subsequent to the effective date of the Rules of Civil Procedure, and was intended to harmonize with them.¹⁵ Yet, if Rule 9 were interpreted as a jurisdictional requirement, as petitioner urges, it would be repugnant at least in principle to several of the Rules of Civil Procedure. Rule 73 (a) (*supra*, p. 3) provides that "Failure of the appellant to take any of the further steps [subsequent to filing the notice of appeal] to secure the review of the judgment appealed from does not affect the validity of the appeal * * *." Rule 75 (d) (*supra*, p. 4) requires the filing in certain cases of a statement of points to be relied upon. Yet, failure to file such a statement in any case in which it may be required does not affect the jurisdiction of the appellate court under the plain provisions of Rule 73 (a). Cf. *Adams v. New York C. & St. L. R. Co.*, 121 F. (2d) 808, 809 (C. C. A. 7). While Rule 73 (g) (*supra*, pp. 3-4) limits the power of the Dis-

¹⁵ In promulgating this and other rules, the Circuit Court of Appeals stated: "These rules have been adopted by the Court in an effort to secure greater uniformity of practice in the United States Circuit Courts of Appeal and to harmonize with the Rules of Civil Procedure for the District Courts of the United States, adopted by the Supreme Court, effective September 16, 1938."

trict Court to extend the time for filing the record in the Circuit Court of Appeals, the Circuit Court of Appeals may permit the filing of the record after expiration of the time allowed by the District Court, or the time which the District Court might have allowed. *Ainsworth v. Gill Glass and Fixture Co.*, 104 F. (2d) 83, 85 (C. C. A. 3); *Miller v. United States*, 117 F. (2d) 256, 257 (C. C. A. 7); *Johnson v. Wilson*, 118 F. (2d) 557, 558 (C. C. A. 9).

By analogy, also, Rule 75 (h) (*supra*, pp. 4-5) supports the view that Rule 9 of the Circuit Court of Appeals should not be regarded as jurisdictional. Rule 75 (h) authorizes the supplementing of a record on appeal after the original record has been filed, the obvious purpose being to prevent submission of a case to the Circuit Court of Appeals upon an inadequate record.

The Circuit Court of Appeals could have imposed an appropriate penalty for failure of the Government to comply promptly with Rule 9, including, presumably, the dismissal of the appeal (cf. Rule 73 (a)). Undoubtedly it would have done so had any prejudice resulted to the petitioner. It is plain, however, in the present case, that no prejudice resulted. A record complete in every respect except the statement of points required by Rule 9 was promptly filed and made available to petitioner. And at the time the supplemental record containing the statement of points was filed on March 3, 1941 (R. 245), neither party had filed a

brief and the case did not come on for oral argument until April 18, 1941 (R. 246). Indeed, petitioner claims no prejudice.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

CHARLES FAHY,
Solicitor General.

JULIUS C. MARTIN,
Director, Bureau of War Risk Litigation.

RICHARD H. DEMUTH,
WILBUR C. PICKETT,
W. MARVIN SMITH,
KEITH L. SEEGMILLER,

Attorneys.

MARCH 1942.

SUPREME COURT OF THE UNITED STATES.

No. 665.—OCTOBER TERM, 1941.

Harriett V. Pence, Petitioner,	}	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
vs.		
The United States of America.		

[May 11, 1942.]

Mr. Justice JACKSON delivered the opinion of the Court.

This action was begun in the United States District Court for the Eastern District of Wisconsin by the petitioner, a widow, as sole beneficiary of a policy of United States Government life insurance issued to her deceased husband, Doctor Lawrence W. Pence. The only contested issue was raised by the Government's affirmative defense that the policy had been reinstated as the result of fraudulent representations in Doctor Pence's application for reinstatement of the policy after it had lapsed for nonpayment of premium.

At the close of the evidence in the trial court the Government moved for a directed verdict in its favor. The trial judge withheld a ruling on the motion under Rule 50(b) of the Rules of Civil Procedure and submitted the case to the jury, which returned a general verdict for the petitioner. The Government then moved under Rule 50(b) for judgment notwithstanding the verdict, and, in the alternative, for a new trial. The trial judge denied both motions and entered judgment on the verdict for the petitioner. The Government appealed to the Circuit Court of Appeals for the Seventh Circuit, which held, with one judge dissenting, that the evidence was insufficient to establish a case for the consideration of the jury and that there was no independent ground requiring that a new trial be granted. It reversed the judgment of the District Court and remanded the cause for further proceedings in harmony with its opinion. 121 F. 2d 804. We granted certiorari. 314 U. S. 602.

Petitioner contends that the evidence raised a question of fact for the consideration of the jury, and that the decision of the

Circuit Court of Appeals therefore denies her the right to trial by jury.¹

Doctor Pence had been a physician and medical officer in the military service of the United States from August 7, 1918, to January 9, 1919. While in the service he obtained a \$10,000 policy of yearly renewable War Risk term insurance, which he allowed to lapse on March 2, 1920, for nonpayment of the premium due on February 1, 1920. In 1925 he gave up a private medical practice to accept employment as a physician with the Government, acting thereafter as a specialist in eye, ear, nose, and throat diseases at various veterans' hospitals and homes maintained by the Government. On June 21, 1927, Pence applied for reinstatement and conversion of the lapsed term policy. The policy was accordingly reinstated and converted, effective July 1, 1927; and, except for the question of fraud,² was in force at the time of his death on September 21, 1934.

In his application for reinstatement Pence categorically denied, among other things, that he had ever been treated for any disease of the throat, heart or stomach. So also did he deny that since the lapse of the policy he had consulted any physician in regard to his health, or had been ill or prevented by ill health from attending to his usual occupation.

At the trial there was submitted in evidence a communication from the Regional Medical Officer at Sioux Falls, South Dakota, to the Manager of the Veterans' Administration in Milwaukee, Wisconsin, and dated December 9, 1931. This reported that a gastro-intestinal X-ray examination had been made of Pence at the Sioux Falls Veterans' Hospital on April 6, 1925, and had resulted in a diagnosis of "suspected duodenal pathology." Pence made several statements, subsequent to the reinstatement of his insurance and in support of claims for disability benefits from the Government, that this examination had been made at his request. Mrs. Pence admitted that she knew that such an examination had been made.

¹ This right was conferred by amendment to § 19 of the World War Veterans Act, 43 Stat. 1302, 38 U. S. C. § 445. *Whitney v. United States*, 8 F. 2d 476; *Hacker v. United States*, 16 F. 2d 702; *United States v. Salmon*, 42 F. 2d 353; *United States v. Green*, 107 F. 2d 19; H. R. Rep. No. 1518, 68th Cong., 2d Sess., p. 2.

² A defense on this ground is authorized by § 307 of the World War Veterans Act, 38 U. S. C. § 518.

About fifteen months after his application for reinstatement, and on August 27, 1928, Pence applied to the Government for disability compensation, claiming that he was disabled by chronic sinusitis, ethmoiditis, atrophic rhinitis, and by myocarditis. On September 7, 1928, he executed and submitted a sworn statement in support of his application for disability compensation that he suffered from the following disabilities: "sinusitis frontal, ethmoiditis, chronic, atrophic rhinitis, chronic, with loss of sense of smell, myocarditis, chronic . . . incurred . . . on or about October 1918." He also stated "That a physician was called in to treat me on Jan. 1927, when he pronounced my disability sinusitis, frontal, acute exacerbation and prescribed serum and local treatment tending to induce drainage. Treatment was carried out by myself. Was confined to bed for 8 days." Together with this he submitted a supporting "Physician's Affidavit," by Doctor L. Grant Glickman, a practicing physician stationed at the time of the asserted examination at the National Home at Leavenworth, Kansas, where Pence was stationed; and employed at the time of the trial by the Veterans' Administration at Fort Snelling, Minnesota.³

In 1931 and 1933 Pence made statements in support of other claims for benefits similar to those set forth above in that they contradicted the representations made in his application for reinstatement involved in this case. On November 28, 1931, he submitted a statement in support of an application for retirement, to the effect that in 1918 a camp physician by whose authority he remained in barracks under special care while in service examined his heart and told him it was "shot"; that he had acute myocarditis and a severe gastric upset which "turned out to be a forerunner of duodenal ulcer which perforated in 1920 and again in 1925"; and that because of distress and certain symptoms he later re-

³ This affidavit contained the following: "I first examined the claimant on Jan. 16, 1927. His complaint at that time was: Frontal sinusitis & Ethmoiditis, chronic. Upon physical examination I found the following symptoms present: Headache, severe; bloody purulent discharge from nose. I diagnosed the injury or disease as Chronic ethmoiditis & frontal sinusitis with an auto exacerbation. The prognosis was fair but incurable. I do believe the claimant's disability is attributable to his military service, for the following reasons: Statement of claimant that above trouble followed influenza in service. Never troubled before that time with above disabilities. Claimant continued under my care until Jan. 25, 1927, during which time I treated him as follows: Argyrol instillations & packs. Serum therapy."

requested a gastro-intestinal examination at the Veterans' Bureau office at Sioux Falls, South Dakota. He concluded his statement: "I never had a day of sickness in my life before this and I do not believe I have had an entirely well one since." On December 8, 1933, he submitted a sworn application for pension for disability resulting from active military service, stating that since the beginning of service one civilian physician had treated him for sinusitis and myocarditis; and four others for sinusitis alone. One of the latter examinations was stated to have been made by Doctor Glickman in 1926, and another was stated to have been made at a time after the lapse of the policy in suit.

Doctor Glickman was produced at the trial as a witness for the Government, in whose employ he still was at the time. The trial judge ruled out as improper, questions by petitioner's counsel bearing upon the question whether disciplinary action had been taken against Glickman and others because of the execution of affidavits in support of Pence's claim for disability compensation and other of his claims. Upon being asked whether he had an independent recollection of the examination referred to, he stated that he had copies of "records", but not the "originals." The Government's attorney then asked: "Well, Doctor, do you have a recollection of your examination—refresh your recollection of your examination of Dr. Lawrence Pence in January, 1927." Glickman answered "I do." The Government could not locate the record of the treatment made on Glickman's report as officer of the day—apparently the only record made of the treatment—and it was not produced at the trial.

Glickman testified further as follows: Pence called upon him for treatment on January 16, 1927, while he was acting as officer of the day. He concluded that Pence was suffering from sinusitis and ethmoiditis. Pence knew what his findings were, and stated that he was suffering from a recurrence of a chronic condition. Glickman treated Pence at Pence's home on two or three occasions between January 16 and January 25. Mrs. Pence was at home then, although perhaps not on all occasions. Pence had no cold, but Glickman prescribed a cold serum for him, and also some argyrol packs.

Mrs. Pence testified, however, that: She had no knowledge that her husband had consulted a physician. She was close to him, and constantly with him, and believed that he would have told

her of anything seriously the matter with him. He never told her, however, of consulting a physician, or that he suffered from sinusitis, ethmoiditis, or myocarditis. Her husband led an active, vigorous, life, and was never confined to bed except by occasional colds, and suffered from no other sickness. It appeared from her testimony, however, that she was unable to differentiate between a "cold" and a sinus infection.

Pence's two sons and two friends also testified to his active life and apparent good health.

With the evidence in this condition, the Circuit Court of Appeals held that the District Court erred in refusing to withdraw the case from the jury.

The Government, which the Circuit Court of Appeals held was entitled to a directed verdict, had the burden of proof on the issue of fraud. Under the circumstances we have recited, the credibility of Doctor Glickman, its witness, was clearly for the jury. The evidence of the gastro-intestinal examination was likewise insufficient to sustain the direction of a verdict. We assume without deciding that the jury could not have refused to believe that such an examination had been made. Yet the jury could have properly refused to deduce from this all the necessary elements of the defense of fraud, established by our decisions to be: (1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive (5) with action taken in reliance upon the representation.⁴

The case of the Government for a directed verdict rests, therefore, upon the statements of Pence made after the reinstatement of his insurance and contradicting the representations in his application for reinstatement. Their admissibility as against the beneficiary-plaintiff, Mrs. Pence, is not in issue on this record, for they were introduced by the Government and received in evidence without objection.⁵

⁴ *Claffia v. Commonwealth Ins. Co.*, 110 U. S. 81; *Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 665, 673; *Mutual Life Ins. Co. v. Hilton-Green*, 241 U. S. 613; cf. *Derry v. Peek*, 14 App. Cas. 337, 374.

⁵ Compare *Truetsch v. Miller*, 186 Wis. 239, 250; *Connecticut Mutual Life Ins. Co. v. Hillmon*, 188 U. S. 203. It does not appear from the report of the *Hillmon* case whether the insured had the power to change the beneficiary, as he did in the present case. § 301 of the World War Veterans Act, 38 U. S. C. § 512. The effect of such a power to make the insured's statements mismissible against the beneficiary has frequently been dealt with by the courts and commentators. 4 Wigmore, *Evidence* (2d ed.) 146, note 6; *Kales, Admissibility of Declarations of the Insured against the Beneficiary*, 6 *Columbia Law Review* 509; *Morgan, The Rationale of Vicarious Admissions*, 42 *Har-*

Pence's representations in the application were not evidence of their own veracity.⁶ His later contrary statements were repeated and usually under oath; they are in no way improbable, and are the statements of one who, being himself a doctor, spoke with knowledge of the subject and bearing of his statements. His admissions left no room for conjecture as to the falsity of the previous statement in the application, and of his knowledge of such falsity. From these facts the requisite intent to defraud is presumed,⁷ and therefore need not be proven in the absence of countervailing evidence. Materiality and reliance were conclusively established by evidence introduced at the trial, if indeed such proof were needed.

No evidence in the case served in any way to contradict, qualify, or explain Pence's admissions.⁸ We are of opinion that in the absence of any such evidence his admissions established so overwhelming a case in favor of the Government as to require the direction of a verdict in its favor,⁹ and the decision of the Circuit Court of Appeals is, therefore,

Affirmed.

vard Law Review 461, 477-78; *Finale, The Admissibility of Declarations of the Assured in Life Insurance Litigation*, 8 St. John's Law Review 258; 4 Minnesota Law Review 359.

The cash, loan, and other values of the policy in suit to Pence at the time of his various statements contradicting the representations in his application for reinstatement and conversion of the policy in suit do not appear in the record. Compare § 301 of the World War Veterans Act, 38 U. S. C. § 512.

⁶ If the law were otherwise, it would follow that a verdict could never be directed in favor of a party alleging fraud in any case in which the falsity of a representation was in issue. Yet, verdicts have frequently been directed in such circumstances. Cf. *Bella S. S. Co. v. Ins. Co. of North America*, 5 F. 2d 570; *Aetna Life Ins. Co. v. Bolding*, 57 F. 2d 626; *Aetna Life Ins. Co. v. Perron*, 69 F. 2d 401, certiorari denied, 292 U. S. 570; *Columbian National Life Ins. Co. v. Rodgers*, 93 F. 2d 740.

⁷ *Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81, 95; *Mutual Life Ins. Co. v. Hilton-Green*, 241 U. S. 613, 622; cf. *Agnew v. United States*, 165 U. S. 36, 53; *Stipeich v. Metropolitan Life Ins. Co.*, 277 U. S. 311, 316-317.

⁸ The denial of Pence's various claims is in no way inconsistent with the truth of his admissions here involved, since his claims were allowable only in the event of actual physical disability at the time. That a man is not presently disabled in no way militates against the truth of statements that he had previously consulted a physician, etc.

⁹ *Wilkinson v. Kitchin*, 1 Lord Raymond 89; *Decker v. Pope*, 1 Selwyn, Nisi Prius (13th ed.) 91; *Hendrick v. Lindsay*, 3 Otto 143; *Arthur v. Morgan*, 112 U. S. 495; *Anderson County Commissioners v. Beal*, 113 U. S. 227, 241-242; *Chesapeake & Ohio Ry. v. Martin*, 283 U. S. 209, 216.

SUPREME COURT OF THE UNITED STATES.

No. 665.—OCTOBER TERM, 1941.

Harriet V. Pence, Petitioner,	{	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
vs.		
The United States of America.		

[May 11, 1942.]

Mr. Justice MURPHY, dissenting.

In view of the high value and importance attached by custom and tradition to the right of jury trial as a feature of our federal jurisprudence, and the significant emphasis provided by the Federal and state constitutions, scrupulous care should be exercised by courts and judges to avoid rulings, on motions for the direction of a verdict, which in effect wrongfully deprive a litigant of the cherished right. On such a motion our function is not to evaluate the evidence for the purpose of determining whether fraud has been committed. I am unable to agree with the opinion of the Court because I think there was sufficient evidence to justify submitting the issue of fraud to the jury.

The opinion of the Court recognizes that the testimony of Glickman and the evidence of the gastro-intestinal examination were insufficient to sustain the direction of a verdict, and correctly states the issue thus: "The case of the Government for a directed verdict rests, therefore, upon the statements of Pence made after the reinstatement of his insurance and contradicting the representations in his application for reinstatement". So stated, the case presents a controverted question of fact, and, in view of the evidence in this case, it was for the jury to find the answer by resolving the conflict between the two contrary sets of self-serving statements made by Pence.

It is admitted that "Pence's representations in the application were not evidence of their own veracity". As an abstract matter one would suppose that Pence's later conflicting statements were likewise "not evidence of their own veracity". However, it is said that reasonable men have no choice but to admit the truth

of those later statements because they "were repeated, and usually under oath; they are in no way improbable, and are the statements of one who, himself a doctor, spoke with knowledge of the subject and bearing of his statements". These factors might be persuasive to a jury that the later statements were true, but it is quite a different thing to hold that they absolutely compel belief. On the basis of the record an equally plausible premise is that the statements in the application were the true ones. Pence was never absent from work for any appreciable period of time. The reports of his physical examinations from 1928 to his death were not altogether consistent, and any defect disclosed was evidently thought insufficient to warrant allowing any of his various claims for disability benefits, etc. His widow testified that they were "pretty close to one another", that she believed he would have told her if anything was seriously wrong with him, and that she had no knowledge of any serious ailment or consultation with a physician on his part. All this casts doubt on the truth of Pence's statements made after his application for the reinstatement of his insurance and entitled the jury to pass judgment on them.

Whether Pence was a malingerer or not, disavowing and then asserting injury and disease as a means of collecting different benefits from the Government, is not for us to decide. Suspicion that such was the case does not justify usurping the jury's function of determining, in the light of all the evidence, which of Pence's statements were true and which were false. The case was properly submitted to the jury. Its verdict, rendered on substantial evidence, should not have been set aside.

Mr. Justice BLACK and Mr. Justice DOUGLAS join in this dissent.